No. 02-311-CFH Title: Kevin Wiggins, Petitioner
v.
CAPITAL CASE Sewall Smith, Warden, et al.

Docketed: Court: United States Court of Appeals for
August 29, 2002 the Fourth Circuit

Entry	Date	Proceedings and Orders
	Aug 27 2002	Petition for writ of certiorari filed. (Response due October 3, 2002)
	Sep 6 2002	LODGING consisting of twenty bound copies of related material received from counsel for the petitioner
	Sep 27 2002	Order extending time to file response to petition until October 3, 2002.
	Oct 3 2002	Brief of respondents Thomas R. Corcoran, Warden, et al. in opposition filed.
	Oct 15 2002	Reply brief of petitioner Kevin Wiggins filed.
	Oct 16 2002	DISTRIBUTED for Conference of November 1, 2002
	Nov 4 2002	REDISTRIBUTED for Conference of November 8, 2002
	Nov 12 2002	REDISTRIBUTED for Conference of November 15, 2002
	Nov 18 2002	Petition GRANTED. limited to Question 2 presented by the petition. SET FOR ARGUMENT March 24, 2003. **********
	Nov 27 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including January 9, 2003. Order extending time to file respondents' brief on the merits to and including February 17, 2003.
	Jan 3 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
	Jan 3 2003	Consent to the filing of amicus briefs in support of either party received from counsel for respondents Corcoran and Curran.
	Jan 3 2003	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
	Jan 9 2003	Brief amicus curiae of Constitution Project filed.
	Jan 9 2003	Brief amici curiae of Janet F. Reno, et al. filed.
	Jan 9 2003	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
	Jan 9 2003	Brief amici curiae of National Association of Social Workers, et al. filed.
	Jan 9 2003	Joint appendix filed.
	Jan 9 2003	*Jt. Appendix in two volumes.
	Jan 9 2003	Brief of petitioner Kevin Wiggins filed.
	Jan 9 2003	Brief amicus curiae of American Bar Association filed.
	Jan 30 2003	Record filed.
	Feb 3 2003	CIRCULATED.
	Feb 18 2003	Brief of respondent Sewell Smith, Warden, et al. filed.
	Feb 18 2003	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Feb 19 2003	Brief amicus curiae of United States filed.
	Feb 24 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided

app

No. 02-311-CFH

Entry	Date	Proceedings and Orders
		argument filed.
	Mar 3 2003	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 14 2003	Reply brief of petitioner Kevin Wiggins filed.
	Mar 14 2003	Lodging consisting of a letter and two page document received from counsel for the respondent and distributed.
	Mar 24 2003	ARGUED.

Supreme Court
FILED

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No. 02-___

IN THE

Supreme Court of the United States

KEVIN WIGGINS,
Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In this case, the United States Court of Appeals for the Fourth Circuit held that under 28 U.S.C. § 2254(d)(1), a state court application of established federal law will satisfy the "objectively reasonable" standard of review set forth in *Williams v. Taylor*, 529 U.S. 362 (2000), so long as it is "minimally consistent with the facts and circumstances of the case." The questions presented are:

1. Does the Due Process standard of *Jackson v. Virginia* require a court to consider "all of the evidence" in deciding whether a reasonable factfinder could have found guilt beyond a reasonable doubt, as this Court held in *Jackson* and the First, Fifth and Seventh Circuits have likewise held, or may a conviction based entirely on circumstantial evidence be upheld under *Jackson* by considering only the evidence consistent with guilt and ignoring all evidence refuting guilt, as the Fourth Circuit held in this case.

2. Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Kevin Wiggins was the appellee below. Thomas R. Corcoran, warden of the Maryland Correctional Adjustment Center, and J. Joseph Curran, Jr., attorney general of the State of Maryland, were appellants below.

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IN THE

Supreme Court of the United States

No. ____

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kevin Wiggins respectfully requests this Court to issue a writ of certiorari to review a decision of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Fourth Circuit, reported at 288 F.3d 629 (4th Cir. 2002), is reprinted at Pet. App. 1a-26a. The decision of the United States District Court for the District of Maryland, reported at 164 F. Supp. 2d 538 (D. Md. 2001), is reprinted at Pet. App. 28a-89a. The order of the United States Court of Appeals for the Fourth Circuit, denying rehearing and rehearing *en banc*, is set forth at Pet. App. 157a-158a.

JURISDICTION

The Court of Appeals' judgment was entered May 2, 2002. A timely petition for rehearing and rehearing *en banc* was

denied May 29, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the provision of the federal habeas statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. 159a-162a.

STATEMENT OF THE CASE

A. Background

On September 17, 1988, an elderly white woman named Florence Lacs was found drowned in the bathtub of her apartment in Woodlawn, Maryland. Her apartment had been ransacked. Five days later, the police found two African Americans, Kevin Wiggins (then age 27) and his girlfriend Geraldine Armstrong (then age 42), traveling in Ms. Lacs' car. They were both arrested and charged with murder and robbery.

No direct evidence established how Ms. Lacs died. No witnesses saw her attacked. No one confessed to the crime. No forensic evidence pointed toward a suspect. The state knew only that Wiggins and Armstrong had Ms. Lacs' car and credit cards, and that the credit cards had been used beginning on September 15 at several stores. Armstrong's fingerprints (but not those of Wiggins) were found on the charge slips. Items purchased with the cards were found with Armstrong and Wiggins when they were arrested. The state's theory was that Ms. Lacs was murdered on the 15th before her credit cards were used later that evening. The state alleged Wiggins was the murderer because he was working as a painter in Ms. Lacs' apartment building.

The murder and robbery charges against Geraldine Armstrong were never pursued. Armstrong, however, had repeated uncounseled conversations with the prosecutors, and

testified against Wiggins before the Grand Jury and at trial. Armstrong had taken a polygraph examination while in custody. According to the examiner's report, Armstrong answered dishonestly when asked whether she had been in the victim's apartment and had participated in the murder.[1] Additionally, one of Armstrong's brothers lived in an apartment directly underneath that of the victim. Another of Armstrong's brothers fought with Wiggins, brandishing a gun, when Wiggins had arrived at Geraldine's home on the evening of the 15th. CA App. 98. Despite having all charges against her dropped, Armstrong testified that she received no leniency in return for her testimony.

B. The Guilt/Innocence Trial

Two public defenders, Carl Schlaich and Michelle Nethercott, represented Wiggins. Schlaich had previously second-chaired one capital case. Nethercott had never represented a capital defendant, and had less than one year of overall experience. Shortly after the appointment, Schlaich left Baltimore County to lead the Harford County defender's office. He spent one day per week on his lingering Baltimore County responsibilities. CA App. 1176-77. Nethercott thus had principal responsibility for trial preparation. Shortly after this case ended, Schlaich was fired as a public defender.

Wiggins waived a jury trial and was tried before the Honorable J. William Hinkel of the Baltimore County Circuit Court. The prosecution's opening statement noted that Ms. Lacs was last seen alive on September 15, 1988, that Wiggins was working near her apartment that day, and that Wiggins was in possession of Ms. Lacs' car and credit cards at about 8 p.m. that night. *Id.* 21-24. The prosecution claimed that Wiggins

---

[1]Court of Appeals Joint Appendix ("CA App.") 1399.

murdered Lacs at 5 p.m. on the 15th, and indicated that this could be proved by "conversations" Wiggins had with two inmates while incarcerated after his arrest. *Id.* 24.

The prosecution called John McElroy and Christopher Turner to substantiate Wiggins' alleged admissions. Both had met Wiggins for the first time in prison. On cross-examination, McElroy acknowledged that he "made up" the central elements of his testimony against Wiggins. *Id.* 58. Cross-examination similarly undermined Turner by establishing that he had been clinically diagnosed as actively psychotic, and had a long history of providing information in exchange for sentencing leniency. Both witnesses testified that they were cooperating in this case in order to secure reduced sentences for pending convictions. *Id.* 54-55, 131-38, 164-65.

Apart from these witnesses, the case was entirely circumstantial. The prosecution called three witnesses to try to tie Wiggins to the crime – Chianti Thomas (then an eleven-year old girl), Geraldine Armstrong, and Robert Weinberg (Wiggins' employer). On September 15, Thomas had been visiting a friend who lived across the hall from Ms. Lacs. Thomas testified that, while standing in the apartment hallway at about 5 p.m., she observed an African American man come up the stairs and speak briefly to Ms. Lacs about having moved some sheetrock. *Id.* 83-86. The prosecution repeatedly asked Thomas whether she could identify anyone in the courtroom as the person she saw that day, but she could not. *Id.* 86, 90. Thomas also testified that the police had asked her to make a photographic identification shortly after the murder, and that she picked the photo of "the man that had looked the closest to the man" she saw on the 15th. *Id.* 92. On cross-examination, Thomas testified that the person she saw on the 15th had left the building immediately after his brief conversation with Ms.

Lacs, while Ms. Lacs was still alive. *Id.* 93. There was no evidence that this person ever returned.

Geraldine Armstrong testified that Wiggins had arrived at her home at 8 p.m. on the 15th, and asked to come in to wash off the paint from his work. CA App. 97-98. She also testified that her brother Adolphus began an argument with Wiggins that quickly escalated to a serious altercation in which her brother pulled a gun. She then testified that she and Wiggins left to go shopping in Ms. Lacs' car and used Ms. Lacs' credit cards to purchase items for Armstrong and her child. She initially denied familiarity with the Woodlawn apartments, but eventually admitted that her brother Melvin lived directly beneath Ms. Lacs. *Id.* 102.

Robert Weinberg testified that Wiggins was in his employ painting apartments adjacent to that of Ms. Lacs on the 15th, and that Wiggins had appeared in his office sometime around 4:45 p.m. and was released for the day. *Id.* 202. Weinberg further testified that Wiggins returned 20 minutes later, stating that he had moved some sheetrock. *Id.* 838. According to Weinberg's testimony, it would have taken at least five minutes to walk from the office to Lacs' apartment, a couple of minutes to move the sheetrock, and another five minutes or more to return to the office. *Id.* 839, 843. Weinberg testified that Wiggins had in fact moved the sheetrock. *Id.* 197.

Lacking any direct evidence that Ms. Lacs died between the time when Thomas allegedly saw Wiggins and when Wiggins later allegedly arrived at Armstrong's home, the prosecution called a medical examiner, Dr. Margarita Korell, to establish that Lacs died on the 15th. Korell, however, ultimately testified that it was impossible to ascertain when Ms. Lacs died. *Id.* 264-68. Korell had previously signed a death certificate stating that Ms. Lacs died on September 16th.

The prosecution also elicited testimony from Ms. Lacs' friends. Edith Vassar testified that she had been with Lacs on Thursday, September 15. Vassar, however, testified that she "received a phone call" from Lacs on Friday the 16th. CA App. 67. On cross-examination, she reiterated that she was "quite sure" she spoke to Lacs on Friday. *Id.* 69. Vassar reported the conversation to the police, and thereafter received a call from an unknown person trying to convince her she must be in error. *Id.* 71. The prosecution also called Mary Elgert and Elizabeth Lane. Elgert testified that Ms. Lacs was wearing a blue skirt on the 15th. *Id.* 75. Lane had given the police a missing persons report indicating that Ms. Lacs was wearing a red dress on the 15th. *Id.* 390-391.

Finally, the prosecution presented forensic evidence. A detective testified that he recovered a baseball cap with a Ryder logo in Ms. Lacs' apartment, as well as fingerprints inside the entrance door, on the kitchen wall, and on the bathroom doorjamb. CA App. 217, 222. Three prints were of "comparison value," but none matched Wiggins. *Id.* 233-35, 356. No hairs and fibers from the cap matched those taken from Wiggins. *Id.* 284-285. Another detective testified to the extensive ransacking of Ms. Lacs' apartment. *Id.* 300-38. He also testified that a latex glove had been found on Wiggins. *Id.* 350. There was no evidence that the glove contained traces of the substances (such as Black Flag or cleanser) found in Ms. Lacs' tub.

The defense then presented its case, which consisted principally of the testimony of Dr. Gregory Kaufman, an expert in forensic pathology. Kaufman testified that Lacs died no earlier than 3 a.m. on September 17. *Id.* 452-53.

During closing arguments, the prosecution disavowed its jailhouse witnesses (McElroy and Turner), asserting that "we would like to distance ourselves from them as far as possible."

Id. 544. Thus, by the end of the evidentiary submissions the prosecution failed to prove that Wiggins admitted the murder, presented no forensic evidence indicating Wiggins entered Ms. Lacs' apartment or was involved in the murder, and failed to present any eyewitness testimony or other direct evidence proving Wiggins' guilt. Additionally, the state's own witnesses contradicted the state's case in critical respects. Chianti Thomas, on whom the prosecution relied to establish Wiggins' presence near Ms. Lacs' apartment on the 15th, testified that the person she saw left the building while Ms. Lacs was still alive. Edith Vassar testified that she was certain she spoke to Ms. Lacs on September 16. The state nevertheless contended that Wiggins must have been the murderer because he was near the apartment on the 15th, and (according to Geraldine Armstrong) possessed Ms. Lacs' car and credit cards by 8 p.m. that night.

C. The Conviction

The trial court convicted Wiggins. The court rejected the testimony of McElroy and Turner. CA App. 546-47. The court nevertheless concluded that Wiggins must have committed the murder. That conclusion rested on a chain of inferences. The court concluded that Ms. Lacs must have been robbed before her car and credit cards were used on the evening of the 15th; that the robbery must have occurred when Ms. Lacs' apartment was ransacked; and that Ms. Lacs must have been murdered when the apartment was ransacked. Because Wiggins was present at a time when (in the court's view) the robbery and ransacking must have occurred and had possession of the stolen items, the court concluded that Wiggins must have been the murderer.

In reaching that result, the trial court purported to disavow reliance on "any presumption arising from the recent possession of stolen property." CA App. 550. The court stated that it was instead relying on "all the evidence," but did not

identify what evidence supported the judgment. *Id.* The court rejected Ms. Vassar's testimony that Ms. Lacs was alive on Friday the 16th, stating that it was inconsistent with what the court described as "overwhelming" evidence that Ms. Lacs died on the 15th. *Id.* 548-50. The court rejected the defense's expert forensic testimony for the same reason, and not because the expert's methods or analysis were flawed in any way. The court made no mention of the absence of any forensic evidence placing Wiggins in the victim's apartment, or of the evidence showing that someone else had been in the apartment. The court likewise did not mention Chianti Thomas's testimony that the man she saw on the 15th left the building while Ms. Lacs was still alive.

D. Sentencing

After entering the verdict, the trial court granted a continuance to permit the defense to prepare for sentencing. When proceedings recommenced in October 1998, Wiggins' counsel requested jury sentencing, despite having chosen a judge trial to decide guilt because Baltimore County juries are too "bent towards guilt" and "death oriented." CA App. 1213.

Wiggins' counsel opted to "retry guilt" by arguing that Wiggins was not a principal in the first degree under Maryland law. *Id.* 1192-93, 1199. They knew, however, that all prospective jurors would receive an instruction that Wiggins "has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs." *Id.* 570. Similarly, counsel knew that after the evidence had been submitted, the judge would instruct the jury that "Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." *Id.* 982. Wiggins' counsel was thus forced to concede in

closing that Wiggins "has been convicted" and that the jury "cannot change that." *Id.* 1018. Counsel could only suggest that it might be "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins." *Id.* 1019. In response, the prosecution reiterated the judge's instructions that Wiggins "has been convicted of first degree murder and robbery" and that the jurors' duty was to "consider his crime" and "weigh that . . . against what you know about his background." *Id.* 1034, 1038. The jurors, however, knew nothing of that background. Wiggins' counsel conducted no additional investigation or preparation for the sentencing beyond what they had done for trial, and they introduced no mitigation evidence. Thus, when the jury weighed the crime against Wiggins' background, they knew only the stipulated fact that Wiggins had no prior convictions. The jury condemned Wiggins to death.

A divided Maryland Court of Appeals affirmed the conviction and sentence.

E. State Postconviction Proceedings

In 1993, Wiggins filed a petition for postconviction relief with the state court. The evidentiary hearing focused on allegations that Wiggins had not received effective assistance of counsel. The evidence established that defense counsel had not investigated or prepared a mitigation case. Indeed, each lawyer testified that the other was responsible for doing so. Pet. App. 52a. Counsel failed to prepare a social history or hire an expert to do so, despite knowing that funds were available for that purpose and that such analyses were a routine practice in their office. Pet. App. 53a; CA App. 1193-94.

The social history submitted to the postconviction court showed that Wiggins suffered horrible abuse. His mother was a chronic alcoholic. Pet. App. 165a-166a. During his

childhood, she frequently left him and his sisters alone for days at a time. *Id.* 54a, 166a-167a. She would hide food from her children before she deserted them, leaving them to beg for food or pick it from trash cans. *Id.* 166a-167a. The children often went hungry for days; at times Kevin had nothing to eat but paint chips. *Id.* 167a. When Mrs. Wiggins was home, she would have sex in front of the children, sometimes while they were in the same bed. *Id.* 171a. If Mrs. Wiggins found that her children had eaten any of the food in the house, she would beat them with belts, straps, even furniture. *Id.* 167a-168a. On one occasion, according to Wiggins' sister, the mother forced Wiggins' hands against a hot stove burner to punish him. *Id.* 154a, 169a-171a.

As a result of this abuse, Wiggins and his sisters were placed in foster care when Wiggins was six. Pet. App. 173a. His initial foster mother's methods of discipline included biting the children and twisting their flesh. *Id.* 54a, 175a-176a. That abuse led to the children being moved again. *Id.* The second foster mother beat the children with straps and belts. *Id.* 176a. Her husband repeatedly molested and raped Wiggins during the young boy's years in the home. *Id.* 54a, 177a-179a. Shortly after this sexual abuse began, Wiggins lost interest in eating, and became so malnourished that he was hospitalized. *Id.* 179a. An I.Q. test taken at this time indicated a borderline retardation level of 72. *Id.* 181a.

At age 16 Wiggins ran away from home, lived on the street for a time, and spent brief periods in other foster homes. Pet. App. 184a-188a. He eventually returned to his second foster home because it provided some stability. *Id.* 188a. After a few months, however, Wiggins was again moved. *Id.* 189a. In the next foster home, he and other foster children were raped repeatedly by the foster mother's sons. *Id.* 54a,190a. When

Wiggins was 18, an examination indicated mental retardation, cranial pathology, and possible head trauma. *Id.* 192a.

Based on this evidence, the state postconviction court ruled from the bench that trial counsel had been ineffective:

> I don't even remember a death penalty case that there was not this social history done. . . . Not to do a social history, at least to see what you have got, to me is absolute error. I just — I would be flabbergasted if the Court of Appeals said anything else. I really don't think that is even a close question.

CA App. 1431. The court also found, based on the documents and testimony, that Wiggins' trial counsel did not know of this mitigation evidence. *Id.* at 1437. Three and a half years later, however, the court issued a final written decision that made no mention of the prior ruling and concluded that counsel's failure to investigate mitigation evidence was a permissible "trial tactic." Pet. App. 155a-156a.[2] The court did, however, reaffirm that Wiggins' counsel did not know of the mitigating evidence presented during the postconviction hearing. *Id.* 142a n.269; *see also id.* 53a & n.15. A divided Maryland Court of Appeals affirmed. *Id.* 92a-130a.

F. District Court Proceedings

Wiggins filed a timely petition for relief pursuant to 28 U.S.C. § 2254 on August 6, 1999. Applying the standard of review applicable under 28 U.S.C. § 2254(d)(1), as explained in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), Chief Judge Motz granted the petition.

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[2]Because of its length (256 pages) the opinion has been excerpted in the Appendix to this petition. The entire opinion can be found at CA App. 1451-1707.

The court invalidated Wiggins' conviction because the Maryland courts had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, a criminal conviction denies due process if a reasonable factfinder could not have concluded that every element of the offense was proved beyond a reasonable doubt. The court explained why the evidence could not support upholding the conviction under that standard. Pet. App. 42a-50a.

The district court invalidated Wiggins' death sentence on the ground that the state courts had unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). That result, the court concluded, followed *a fortiori* from *Williams v. Taylor*, 529 U.S. 362 (2000). As in *Williams*, Wiggins' counsel had failed to investigate and prepare a case in mitigation. Similarly, it would have been unreasonable to find a lack of prejudice because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a. The court declined to distinguish *Williams* on the ground that counsel's conduct here was a legitimate trial tactic. Such a conclusion was unreasonable, the Court held, for two reasons. First, counsel's decision to "retry" guilt was uninformed, and therefore unreasonable, because counsel had no appreciation of the strength of the mitigation case they might have presented. Second, counsel's choice here was so ill-advised that it could not be justified even had it been informed. *Id.* 55a.

G. The Fourth Circuit's Ruling

Invoking circuit precedent predating this Court's decision in *Williams v. Taylor*, the Fourth Circuit held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. Applying

that "minimal consistency" standard, the court reversed Chief Judge Motz and reinstated both the conviction and sentence.

With respect to the conviction, the court held that the state court decision was "minimally consistent with the historical record of facts" because the Maryland Court of Appeals had rejected the conclusion that the robbery and murder were committed after the theft of the victim's car and personal property, Pet. App. 13a, and because the state trial judge had purported to rely on "all the evidence" and not merely a presumption arising from Wiggins' possession of stolen goods. *Id.* 14a n.5. To the extent the court examined the evidence independently (as opposed to merely asking whether the state courts had applied the correct legal standard), it concluded that the state courts had applied *Jackson* reasonably. *Id.* 13a-17a. The Fourth Circuit concluded that it could reasonably be inferred that Ms. Lacs died on September 15, "thus implicating Wiggins in more than mere theft or robbery," and that Wiggins had ample time (30 minutes, in the court's view) to commit the murder and robbery. *Id.* 15a-16a. The court did not discuss most of the evidence contradicting that inference, including the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment (a particularly telling absence given that Wiggins was painting that day and thus could have been expected to leave paint residue behind) and the forensic evidence indicating that someone other than Wiggins had been in the apartment. Nor did the court mention the alternative hypothesis, discussed by the district court, that the Armstrongs were responsible for the crime. Thus, the court never analyzed whether a consideration of all of the evidence could support beyond a reasonable doubt the conclusion that Wiggins murdered Ms. Lacs.

With respect to sentencing, the Fourth Circuit held that the district court erred in concluding that *Williams v. Taylor*

had any bearing on the question whether the state court had applied *Strickland v. Washington* unreasonably. According to the court, *Williams* "merely reaffirms the long settled rule . . . that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." Pet. App. 19a. Concluding that any similarity between this case and *Williams* was "superficial," the Fourth Circuit held that "*Williams* did not establish a *per se* rule that counsel must develop and present an exhaustive social history." *Id.* 20a. Here, the court held, Wiggins' trial counsel "knew" the key facts of Wiggins' childhood – including physical abuse by his mother, and sexual abuse by foster parents – because social service records disclosed those facts. For this reason, the court believed that counsel had investigated sufficiently to justify the "strategic choice" to forego mitigation in favor of retrying guilt. *Id.* 21a. The court did not mention the specific factual findings of the state postconviction court that Wiggins' counsel did not know about Wiggins' history of abuse and that the social service records did not document that history. *See* page 11 *supra*. Nor did the court mention the district court's ruling, which was based on an examination of the social service records (*see* Pet. App. 53a n.15), that those records did not contain evidence of abuse.[3] The court also held, citing pre-*Williams* Fourth Circuit precedent, that "the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness," *id.* 23a – even though Wiggins had no criminal record and nothing in that evidence suggested a predisposition to violence.

[3]In seeking rehearing, Petitioner pointed out this error and provided a complete set of the records for the court's review. The petition was denied without comment. Pet. App. 157a-158a. Those records have been lodged with the Clerk of this Court.

Chief Judge Wilkinson concurred. Though stating his view that Wiggins "very probably committed the heinous offense for which he stands convicted," the Chief Judge was unable to "say with certainty that he did so," and noted "unexplained items" of evidence such as "the unidentified fingerprints, baseball cap, fibers and hairs" as well as the fact that Wiggins "had no prior record." Pet. App. 24a. Judge Niemeyer also wrote separately. He questioned whether "the State court reasonably applied *Strickland*," noting that "[counsel] could have . . . insisted on arguing liability and still have maintained that any death sentence would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." *Id.* 25a. He nevertheless concurred, though without full confidence in the result. *Id.* 26a.

REASONS FOR GRANTING THE PETITION

This case warrants review for two reasons. First, the Fourth Circuit's application of *Jackson v. Virginia* conflicts with *Jackson* itself as well as decisions of other Courts of Appeals. If left uncorrected, that decision will effectively eliminate *Jackson* claims in postconviction proceedings under § 2254(d) in the Fourth Circuit. Second, the Fourth Circuit's application of *Strickland v. Washington* directly conflicts with this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000) (reversing Fourth Circuit's misapplication of *Strickland* in § 2254(d) context), as well as numerous decisions of the Courts of Appeals both before and after *Williams*. Indeed, the Fourth Circuit's *Strickland* ruling reflects a persistent refusal to recognize what this Court and other Circuits recognize as fundamental: in a capital case, counsel must investigate potential mitigating evidence, and cannot make a "reasonable" tactical decision to forego a mitigation case at sentencing absent such an investigation.

More generally, the decision in this case makes clear that the Fourth Circuit continues to be in conflict with the teachings of this Court, and the law of other Circuits, respecting the appropriate standard of review under § 2254(d)(1). In *Williams v. Taylor*, this Court held that the proper standard of review in a federal habeas case is whether the state court's application of federal law was "objectively reasonable." *Id.* at 409. *Williams* rejected the Fourth Circuit's far more deferential approach, which authorized relief only if the state court "applied federal law in a manner that reasonable jurists would all agree is unreasonable." *Id.* (quotation omitted).[4]

Although it paid lip service to *Williams* in this case, the Fourth Circuit actually applied a standard of review as lax as the one this Court previously rejected. Invoking pre-*Williams* precedent that set forth the very standard this Court invalidated in *Williams*, the Fourth Circuit held that to survive review under § 2254(d)(1) a state court decision need only be "minimally consistent with the facts and circumstances of the case." Pet. App. 11a (quoting, *inter alia*, *Wright v. Angelone*, 151 F.3d 151, 156-57 (4th Cir. 1998)). But it is obvious that a state court's application of federal law can be objectively unreasonable even though it is "minimally consistent" with "the facts and circumstances." The Fourth Circuit thus simply repackaged the standard this Court rejected in *Williams*.

In this regard, the Fourth Circuit is in conflict not only with *Williams* but also with the Second, Third, Eighth and Ninth Circuits. As the Second Circuit explained: "Some

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[4]Even before *Williams*, the Third and Eighth Circuits had applied an "objective unreasonableness" standard, and had criticized the Fourth Circuit's "all reasonable jurists" standard as insulating from review "all but those decisions so off the mark that they approach judicial incompetence." *Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999); *see also Matteo v. Superintendent*, 171 F.3d 877, 889-90 (3d Cir. 1999) (en banc).

increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *See Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks and citation omitted). The Third and Eighth Circuits similarly ask "whether the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified." *Keller v. Larkins*, 251 F.3d 408, 418 (3d Cir. 2000) (internal citation and quotation omitted), *cert. denied,* 122 S. Ct. 396 (2001); *see also Boyd v. Minnesota*, 274 F.3d 497, 500 (8th Cir. 2001) (same). And the Ninth Circuit has interpreted *Williams* as reinforcing the standard previously established by the Third and Eighth Circuits: "[T]he court adopted an 'objectively unreasonable' standard, employing the language used in decisions by the Third and Eighth Circuits. . . . The Supreme Court thus chose to adopt the interpretation of AEDPA that espoused the more robust habeas review." *Van Tran v. Lindsey*, 212 F.3d 1143, 1150-51 (9th Cir.), *cert. denied,* 531 U.S. 944 (2000); *accord Gunn v. Ignacio*, 263 F.3d 965, 971 (9th Cir. 2001). *See also Neal v. Puckett*, 286 F.3d 230, 235-36 (5th Cir. 2002) (en banc) (endorsing and applying more stringent standard after *Williams*), *petition for cert. filed,* (U.S. June 13, 2002) (No. 01-10886).

Because it reflects no real change from its pre-*Williams* standard, the Fourth Circuit's "minimal consistency" test conflicts with the law of these Circuits. Parallel circumstances exist in the First Circuit which, like the Fourth Circuit here, refused to alter its supine standard of review after *Williams*. In the First Circuit, it remains the case that "a state court decision is objectively unreasonable only if it 'falls outside the universe of plausible, credible outcomes.'" *Mastracchio v. Vose*, 274 F.3d 590, 597 (1st Cir. 2001) (quoting the pre-

Williams decision of *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)). Other Circuits have criticized that test as inconsistent with *Williams*, *see Van Tran v. Lindsey*, 212 F.3d at 1151; *Francis S. v. Stone*, 221 F.3d at 111, just as they criticized the First Circuit's test in decisions preceding *Williams*. *See Long v. Humphrey*, 184 F.3d 758, 760 (8th Cir. 1999) ("outside-the-universe-of-plausible-outcomes test excludes all but those decisions so off the mark that they approach judicial incompetence"); *Matteo v. Superintendent*, 171 F.3d 877, 889 (3d Cir. 1999).[5]

There thus remains a pressing need to bring clarity and national consistency to the standard of review applied under § 2254(d)(1). As this case vividly confirms, the Fourth Circuit's lax "minimal consistency" test will, in its specific applications, continue to generate conflicts with other Circuits applying established federal law in cases under § 2254(d)(1) and will deny habeas petitioners in that Circuit the right to review that Congress has prescribed.

I. THE FOURTH CIRCUIT'S ADJUDICATION OF PETITIONER'S *JACKSON V. VIRGINIA* CLAIM CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

In *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court held that proof beyond a reasonable doubt was a "substantive constitutional standard." *Id.* at 317. *Jackson* replaced the "no

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[5]The Seventh Circuit has in the past articulated a "minimal consistency" test, but recently clarified its law in a manner that accords with the Second, Third, Eighth and Ninth Circuits, stating that "[i]n making this determination, we do not 'defer' to the state court decision; AEDPA does not provide for the *Chevron* deference afforded administrative agencies," and that its review was "not so limited as to require a finding of judicial incompetence before we are allowed to overturn a state court's decision." *Henderson v. Walls*, 296 F.3d 541, 545 (7th Cir. 2002).

evidence" rule of *Thompson v. City of Louisville*, 362 U.S. 199 (1960), which had provided that due process was satisfied unless there was no evidence supporting a conviction. 443 U.S. at 316. As *Jackson* made clear, "it could not seriously be argued that . . . a 'modicum' of evidence [which would satisfy the 'no evidence' test] could by itself rationally support a conviction beyond a reasonable doubt." *Jackson*, 443 U.S. at 320 (internal quotation marks omitted).

The Fourth Circuit's holding that the Maryland courts applied *Jackson* reasonably in this case conflicts with *Jackson* itself, and conflicts in principle with the holdings of other Circuits in two ways.

First, the decision conflicts with *Jackson*'s clear teaching that "[a] federal court has a duty to assess the historical facts when it is called upon to apply a constitutional standard to a conviction obtained in a state court." *Jackson*, 443 U.S. at 318. Here, the panel accepted at face value the state trial judge's bare assertion of the thoroughness of his approach and the state appellate court's acquiescence in that assessment. That is plainly insufficient to discharge a federal court's duty under § 2254(d)(1), as other Circuits have recognized. In *Hurtado v. Tucker*, 245 F.3d 7, 18 (1st Cir.), *cert. denied*, 122 S. Ct. 282 (2001), the First Circuit made clear that in deciding whether a state court has applied *Jackson* unreasonably, a federal habeas court must assess the evidence independently and cannot rely on the state court's conclusion that the evidence was sufficient. *Id.* ("Even with the deference due by statute to the state court's determination, the federal habeas court must itself look to 'the totality of the evidence' . . . . The failure of the state court to give appropriate weight to all of the evidence may mean that its conclusion is objectively unreasonable.") In *Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1463 (2002), the Fifth Circuit likewise made

clear that the state court's mere invocation of the *Jackson* standard does not obviate the requirement of an independent review of the evidence.

Second, the Fourth Circuit's decision conflicts with *Jackson*'s requirement that the reasonable doubt inquiry be based on "*all of the evidence*," 443 U.S. at 319 (emphasis in original), and not merely the evidence that might support a conviction. As the district court explained, neither the state trial court's guilty verdict nor the Maryland Court of Appeals' application of *Jackson* in evaluating that verdict ever explained how a reasonable factfinder could have found guilt beyond a reasonable doubt based on *all* of the evidence. Instead, those courts ignored the most important evidence contradicting the hypothesis of guilt. Specifically, the state courts did not come to grips with the absence of any forensic evidence that Wiggins entered Ms. Lacs' apartment – evidence that would certainly have existed had he been in the apartment at 5 p.m. on September 15 immediately after a day of painting and working with sheetrock. Nor did those courts attempt to explain the forensic evidence (the fingerprints and the Ryder cap) indicating that someone else was in the apartment when Ms. Lacs was murdered. These courts similarly neglected the role of the Armstrongs, even though Geraldine (like Wiggins) had the victim's car and possessions on the evening of September 15, and was initially charged with the murder and robbery.

The courts likewise did not consider the plausibility of the state's theory that Wiggins entered Ms. Lacs' apartment, thoroughly ransacked it, ran a tub full of water, drowned Ms. Lacs, and found and stole all the items in the few minutes that would have been available to do so under the state's view of the facts. Contrary to the Fourth Circuit's unsupported statement, the evidence does not permit the inference that Wiggins had 30 minutes to commit this crime. His employer testified that he

was gone approximately 20 minutes. CA App. 838. Although it would only have taken two minutes or so to move the sheetrock, it would have taken at least five minutes to walk from the employer's office to Ms. Lacs' apartment and another five to walk back. *Id.* 839, 843. Additionally, Wiggins spent time in conversation with Ms. Lacs and then left the building. When that is factored in, there would have been a few minutes at most available to Wiggins – an interval not even remotely sufficient to do what he is convicted of having done. And that assumes Wiggins actually returned to Ms. Lacs' apartment after Chianti Thomas saw him leave, a supposition that lacks any evidentiary support.

Indeed, the *only* way in which Wiggins' conviction can be described as supported by the record is to ignore this contradictory evidence. *Jackson*, however, permits only "reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. And *Wright v. West*, 505 U.S. 277 (1992), did not change that rule. Although the Court made clear that the evidence need not eliminate every plausible hypothesis of innocence, that decision did not purport to establish that reviewing courts can ignore "all of the evidence" in applying *Jackson* and focus myopically on only the evidence supporting a hypothesis of guilt. That is particularly true in cases – such as this one – where the conviction rests entirely on inferences from circumstantial evidence.

Unlike the Fourth Circuit here, other Courts of Appeals applying *Jackson* in cases under § 2254(d)(1) have recognized their duty to guard against "conjecture camouflaged as evidence." *Piaskowski v. Bett*, 256 F.3d 687, 693 (7th Cir. 2001). In *Piaskowski*, for example, the Seventh Circuit made clear that under *Jackson* "each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation." *Id.* Similarly, in *United States v. Coleman*, No. 99-50018, 2001

U.S. App. LEXIS 18004, at *6-*7 (9th Cir. Aug. 7, 2001) (unpublished), the Ninth Circuit determined that an inference insufficiently supported by the record could not sustain a finding of guilt beyond a reasonable doubt. *Cf. United States v. Hall*, 999 F.2d 1298, 1299-1300 (8th Cir. 1993) ("We believe that while a reasonable mind might have followed the path outlined by the government, it would nevertheless still have had to entertain a reasonable doubt with respect to the identity of the perpetrator . . . of the crime"). The Fourth Circuit's approach in this case is at odds with those decisions.[6] If left uncorrected, the Fourth Circuit's "minimal consistency" approach to evaluating *Jackson* claims under § 2254(d)(1) will, as a practical matter, eliminate the substantive protection of *Jackson* in cases under that provision.

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[6]In a case decided before Congress amended § 2254 in 1996, the Fourth Circuit applied *Jackson* correctly. "Favoring the prosecution with all inferences does not mean that we ignore evidence that is in the record, but which they ignore." *Evans-Smith v. Taylor*, 19 F.3d 899, 910 n.29 (4th Cir. 1994). In *Evans-Smith*, the Fourth Circuit condemned as inconsistent with *Jackson* the very reasoning that the state courts employed in this case to convict Wiggins and to affirm that conviction – *i.e.* reasoning backward from the conclusion that Wiggins committed the murder and rejecting all evidence inconsistent with that hypothesis. The Fourth Circuit did not mention the *Evans-Smith* decision in its opinion in this case, even though it was briefed extensively and was discussed in the petition for rehearing – thus suggesting that the Fourth Circuit believes its "minimal consistency" standard of review under § 2254(d)(1) obviates any need to determine whether a state court has applied established federal law incorrectly.

II. THE FOURTH CIRCUIT'S APPLICATION OF *STRICKLAND V. WASHINGTON* CONFLICTS WITH THIS COURT'S DECISION IN *WILLIAMS V. TAYLOR*, AS WELL AS THE DECISIONS OF OTHER CIRCUITS.

This Court should also grant review of the Fourth Circuit's extraordinary ruling that *Strickland v. Washington* does not impose on capital counsel a duty to investigate potential mitigation evidence, and that counsel's choice to forego putting on mitigation evidence is "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background. Pet. App. 17a. That decision conflicts with *Williams v. Taylor* as well as the prevailing law of the circuits.

In rejecting the district court's conclusion that *Williams v. Taylor* governed this case, the Fourth Circuit asserted that "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history . . . in a capital murder case." Pet. App. 19a. Rather, the court opined, *Williams* "merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." *Id.* (citing *Penry v. Lynaugh*, 492 U.S. 302 (1989)). But that plainly misreads *Williams*. It was not an Eighth Amendment case about a defendant's right to present mitigating evidence; it was a Sixth Amendment case about counsel's obligation to investigate and present that evidence. And *Williams* did not state, or even remotely imply, that only "particularly glaring failure[s]" would raise issues under *Strickland v. Washington*. Pet. App. 19a. To the contrary, the *Williams* Court found ineffective assistance because "trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation

evidence" and "failed to present evidence showing that Williams had a deprived and abused upbringing." 529 U.S. at 415 (O'Connor, J., concurring).[7]

This case is not materially different from *Williams*. Like Williams, Wiggins was abused and then abandoned by his mother. Like Williams, Wiggins was placed in abusive foster care settings. Like Williams, Wiggins was borderline mentally retarded. In addition, Wiggins was subject to ongoing sexual abuse by his foster father, as well as sexual abuse in other foster homes. Wiggins was also homeless for a significant portion of his adult life, as well as part of his adolescence. But unlike Williams, Wiggins had no criminal record or history or violence. In *Williams*, the state introduced significant evidence of the defendant's future dangerousness. Indeed, the dissenting opinion noted that Williams had engaged in a life-long crime spree, and noted the "strong evidence that [Williams] would continue to be a danger to society, both in and out of prison." *Williams*, 529 U.S. at 419 (Rehnquist, C.J., concurring in part and dissenting in part). Here, in contrast, the prosecution introduced no evidence (apart from the underlying facts of the crime) to support the death sentence in Wiggins' case.[8]

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[7] *Bell v. Cone*, 122 S. Ct. 1843, 1854 (2002), is not to the contrary. In *Bell*, trial counsel presented vast mitigating evidence during the guilt phase, thus demonstrating extensive investigation and preparation, and simply chose not to recall those witnesses at sentencing. *Id.* at 1852-53. But trial counsel "*investigated* the possibility of calling other witnesses," *id.* at 1853 (emphasis added), thereby satisfying the constitutional requisite. Furthermore, "the prosecution adduced overwhelming physical and testimonial evidence showing that respondent perpetrated the crimes and that he killed . . . in a brutal and callous fashion." *Id.* at 1847-48.

[8] The Fourth Circuit is also in conflict with *Williams* in its holding that counsel reasonably could have concluded that mitigation evidence would have done more harm than good. *See* Pet. App. 22a. In *Williams*, this Court made clear that counsel's performance was deficient, and that Williams

The Fourth Circuit sought to distinguish *Williams* on the ground that counsel here made a tactical decision to forego a mitigation case, whereas counsel in *Williams* merely defaulted on his responsibilities. In that regard, however, the Fourth Circuit's decision conflicts with the prevailing law in the Circuits in two related respects.

First, the Fourth Circuit has rejected the principle that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is *strictly observed*." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (emphasis added) (internal citation and quotations omitted). That principle was well-established in other Circuits before this Court's decision in *Williams*, and it has been pervasively reaffirmed since *Williams* was decided. *See Neal*, 286 F.3d at 236-37 (en banc) ("[W]e consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances.") (internal quotation omitted);[9] *Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (en banc); *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (noting that "the [*Williams*] Court held that counsel's failure to investigate and present evidence of a defendant's mental defect and social history constitutes deficient performance"), *cert. denied*, 122 S. Ct. 2645 (2002); *Lindstadt v. Keane*, 239 F.3d 191, 200 (2d Cir. 2001) (noting

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suffered prejudice, even though "not all of the additional evidence was favorable to Williams" in that (unlike the evidence here) it included past criminal activity. 529 U.S. at 396.

[9] To assess counsel's performance under that standard, the Fifth Circuit "look[s] to such factors as what counsel did to prepare for sentencing, what mitigation evidence he had accumulated, what additional 'leads' he had, and what results he might reasonably have expected from those leads." *Id.* at 237.

that *Williams* "[held] that a failure to investigate and present mitigating evidence during sentencing hearing constituted ineffective assistance"); *Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) (noting that *Williams* "[found] counsel ineffective because they failed to conduct an investigation that would have uncovered information graphically describing Williams' 'nightmarish childhood' and the fact that he had been severely abused by his father and placed in foster care."); *Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002). Whereas the prevailing law in other Circuits makes investigation of a capital defendant's background virtually a mandatory duty absent unusual circumstances, the Fourth Circuit considers it just one option among many for defense counsel.

Second, the Fourth Circuit's decision conflicts with the prevailing standards in other Circuits for determining when counsel has undertaken sufficient investigation to justify deferring to counsel's trial tactics. In this case, the Fourth Circuit held that counsel's decision should be considered "virtually unchallengeable," Pet. App. 17a, so long as counsel has "some knowledge about potential avenues of mitigation on behalf of a client" – irrespective of whether counsel follows up on that knowledge by investigating it. *Id.* 19a. Thus, the Fourth Circuit concluded in this case that counsel's knowledge of the rudimentary facts about a defendant's background (here, that he was taken from his mother and placed in foster care, and was of limited intelligence) *discharges* counsel's duty to investigate further. The prevailing law in other Circuits, however, is that possessing such evidence *triggers* the duty to investigate. *E.g. Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) (counsel had "a small amount of information" that necessitated further inquiry).

In *Coleman v. Mitchell*, for example, the Sixth Circuit similarly held that counsel could not make a reasoned decision to forego mitigation in favor of a residual doubt defense because counsel had not investigated, and therefore did not realize he could have presented, a powerful case based on the defendant's abused childhood. 268 F.3d at 447-54. *Accord Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"), *cert. denied*, 531 U.S. 1035 (2000). The Tenth Circuit has rejected as unreasonable counsel's decision to focus on "sympathy and mercy" rather than a mitigation case when counsel did not thoroughly investigate available mitigation evidence prior to choosing his strategy. *Battenfeld v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001). As both *Coleman* and *Battenfeld* explain, counsel who has not thoroughly investigated available defenses cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfeld*, 236 F.3d at 1229; *Coleman*, 268 F.3d at 447.

The Seventh, Eighth, Ninth and Eleventh Circuits apply similar tests. *See Washington v. Smith*, 219 F.3d 620, 633 (7th Cir. 2000); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Jackson v. Herring*, 42 F.3d at 1367 ("Thus, our case law rejects the notion that a strategic decision can be

reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotations omitted); *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991).

In sum, the Fourth Circuit is fundamentally out of step with the Sixth Amendment principles established by this Court and applied in other Circuits. It should go without saying in a capital case that a decision as fateful as deciding to forego a mitigation defense cannot be reasonable unless it is fully informed. That much follows ineluctably from the bedrock proposition that "only when the jury is given a vehicle for expressing its reasoned moral response . . . in rendering its sentencing decision . . . can we be sure that the jury . . . has made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 121 S. Ct. 1910, 1920 (2001) (internal citation omitted). Given the absolute centrality of mitigation issues to the sentencing judgment, counsel must know – and must be in a position to explain to their clients – what they will be giving up by foregoing mitigation and opting for a different sentencing defense (such as "retrying guilt"). This Court has recognized that fundamental point, and Courts of Appeals other than the Fourth Circuit routinely apply it.

Finally, the Fourth Circuit's analysis of the *Strickland* issue starkly illustrates why a "minimal consistency" standard of review is inappropriate under § 2254(d)(1). In reaching the conclusion that Wiggins' counsel was adequately informed about his background, the court correctly noted that counsel had gleaned some basic knowledge from social service records. Pet. App. 20a. But the court made a serious error in its further assumption that those records contained evidence of the abuse and neglect that prompted his placement in foster care (including having his hands burned as a child as a result of his mother's abuse), or of the sexual violence perpetrated against

him by foster parents and others, or of most of the other horrible realities of his youth. The state trial court, which took evidence and heard the testimony of Wiggins' trial counsel, made specific factual findings to the contrary. The district court, which examined the social service records, likewise concluded (in a ruling the Fourth Circuit does not mention) that they did not contain this information. Pet. App. 53a & n.15. Indeed, those records speak for themselves and contain none of what the Fourth Circuit assumed they contain. Thus, possession of those records cannot possibly have provided trial counsel with information sufficient to make an informed tactical decision to forego a case in mitigation.[10]

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[10]The Fourth Circuit's mistake was based in part on the Maryland Court of Appeals' equally erroneous assumptions about what the social service records contained. Pet. App. 20a-21a. As Chief Judge Motz explained, the Maryland Court of Appeals' contrary statement was entirely unreasonable; the social service records themselves demonstrate by clear and convincing evidence that such physical and sexual abuse is *not* referenced, and trial counsel had access to no other information. Pet. App. 53a-55a & n.15; 28 U.S.C. § 2254(d)(2), (e)(1).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 27, 2002

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APPENDICES

Appendix A

United States Court of Appeals,
Fourth Circuit.

Kevin WIGGINS, Petitioner-Appellee,
v.
Thomas R. CORCORAN, Warden, Maryland Correctional Adjustment Center; William W. Sondervan, Commissioner of Corrections of the State of Maryland; J. Joseph Curran, Jr., Respondents-Appellants.

No. 01-23.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-99-2420-JFM)

Argued Jan. 24, 2002.
Decided May 2, 2002.

ARGUED: Ann Norman Bosse, Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Respondents-Appellants. Donald Beaton Verrilli, Jr., Jenner & Block, L.L.C., Washington, D.C., for Petitioner-Appellee. ON BRIEF: J. Joseph Curran, Jr., Attorney General of Maryland, Criminal Appeals Division, Office of the Attorney General, Baltimore, Maryland, for Respondents- Appellants. Lara M. Flint, Brian P. Hauck, Jenner & Block, L.L.C., Washington, D.C., for Petitioner-Appellee.

Before WILKINSON, Chief Judge, and WIDENER and NIEMEYER, Circuit Judges.

Reversed by published opinion. Judge WIDENER wrote the opinion. Chief Judge WILKINSON wrote a concurring opinion. Judge NIEMEYER wrote a concurring opinion.

OPINION

WIDENER, Circuit Judge.

Introduction

The State of Maryland appeals from the district court's grant of Kevin Wiggins' 28 U.S.C. § 2254 petition for a writ of habeas corpus. The district court invalidated Kevin Wiggins' capital murder conviction under *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and death sentence under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The district court found that the Maryland Court of Appeals, although stating properly the governing principle of *Jackson v. Virginia,* applied it unreasonably in upholding Wiggins' capital murder conviction. Furthermore, the district court found that Wiggins' sentencing counsel was ineffective for failure to investigate and present a case in mitigation during sentencing in accord with *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). This court has jurisdiction pursuant to 28 U.S.C. § 2253 and we reverse.

I. *Facts*

Kevin Wiggins was indicted in the Circuit Court for Baltimore County, Maryland on October 20, 1988 for the

capital murder and robbery of Florence Lacs. Wiggins was also indicted on charges of burglary and theft. The State filed notice of intention to seek the death penalty. Wiggins elected a trial by judge, and after four days of trial, Judge Hinkel found Wiggins guilty of the first degree murder of Florence Lacs, robbery, and two counts of theft.

The evidence adduced at trial established that, on September 17, 1988 at approximately 3:50 p.m., Florence Lacs was found dead in her bathtub partially covered by cloudy water. She was wearing a blue skirt, white blouse, and white beads. This clothing was similar to or the same as the outfit Mrs. Lacs had worn on Thursday, September 15, 1988 when she accompanied her friend Mary Elgert to a luncheon. Mrs. Elgert testified that at the time Mrs. Lacs was wearing a blue skirt and white blouse. Mrs. Elgert also testified that Mrs. Lacs drove her home from the luncheon at about 4:00 p.m.

Elizabeth Lane, another acquaintance of Mrs. Lacs, passed by her apartment at approximately 4:00 p.m. on September 16 and noticed that her orange-red Chevrolet Chevette was not in the parking lot. A third friend, Edith Vassar, testified that she "received a phone call on Friday," September 16 and that she was "quite sure" it was Mrs. Lacs on the phone.[1] When Mrs. Lacs did not arrive at Mrs. Lane's home for a scheduled card game on September 17, Mrs. Lane became alarmed and called the police at around 2:00 p.m. She told the police that she had last seen Mrs. Lacs on September 15 and at the time Mrs. Lacs was wearing a red dress.

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[1] Edith Vassar testified that after she reported this conversation to the police, she received a phone call from an unknown person who tried to convince her that her recollection of the date of the conversation with Lacs was in error.

Upon arrival at Mrs. Lacs' apartment, the police found no evidence of forced entry, either at the doors or the windows, but that the apartment had been partially ransacked. Detective Ches testified that he found a baseball cap bearing a Ryder logo on the living room floor. Detective Ches found a wet cloth on the dining room table and a damp towel on Mrs. Lacs' bed. He further testified that he lifted several fingerprints from the inside of the entrance door, the kitchen wall, and on the bathroom doorjamb. In the bathtub, floating in the water, Detective Ches found a dark colored thread. Some kitchen cleaners and a can of Black Flag were observed on the bathroom floor. Detective Crabbs testified to the presence of two *T.V. Guides* on the coffee table in front of the sofa. One, dated September 10-16, had been marked in pen through September 15 and had a bookmark inserted in the pages for that date. The other copy, dated September 17-23, was unmarked.

Detective Butt analyzed the fingerprints taken from the crime scene. He identified two of them as coming from two of the officers at the scene, but the other prints did not match Wiggins or Mrs. Lacs. Furthermore, tests of the fibers and hairs from the hat and bathtub were not associated with Wiggins.

Dr. Margarita Korell, Assistant State Medical Examiner, performed an autopsy on Mrs. Lacs on the morning of September 18. Dr. Korell observed that Mrs. Lacs' lungs were bogey, that is to say contained fluid and were hyperinflated, a sign of drowning. Additionally, Dr. Korell testified that she observed trauma on the left hand (bruise) and an area of bleeding in the muscle that covers the thyroid cartilage. She testified that these latter injuries were caused by "some external force" consistent with a struggle prior to the victim's death. From this, Dr. Korell concluded that Mrs. Lacs was murdered. However, Dr. Korell could not determine the maximum period

Mrs. Lacs had been dead to any degree of medical certainty.

Chianti Thomas, a 12-year old resident of Mrs. Lacs' building, testified that on September 15, at some time between 4:30 and 5:00 p.m., she was visiting with Chantell Greenwood and Shanita Patterson at an apartment near Mrs. Lacs' apartment. When they left the apartment, Miss Patterson had trouble locking the door, and she sought Mrs. Lacs' assistance. A man approached and offered to help. Miss Thomas testified that, at between 5:00 and 5:30 p.m., she heard this man thank Mrs. Lacs for watching some sheetrock for him. Miss Thomas identified this man as Wiggins from a pre-trial photographic lineup. However, she was unable to identify Wiggins in court. Finally, Miss Thomas testified that after the conversation with Mrs. Lacs, Wiggins left.

Robert Weinberg, Wiggins' employer and construction contractor, was working at Mrs. Lacs' building at the time of her death. Weinberg testified that on September 14, Mrs. Lacs called out to Wiggins from her window expressing concern that a work truck might block her car. Weinberg assured her that the truck would not block her car. Weinberg testified that on September 15 he released Wiggins from work between 4:00 and 4:30 p.m., but that about 30 minutes later, Wiggins came back and told him that he had moved some sheetrock, a service Weinberg had not requested. Weinberg stated that this action would have taken only about 1-1/2 to 2 minutes, and that, although Wiggins reported for work on September 16, he left early because he said he was being evicted on that day.

Geraldine Armstrong, Wiggins' girlfriend, testified that Wiggins came to pick her up on September 15 in Mrs. Lacs' Chevette at around 7:45 p.m. After having an altercation resulting in Miss Armstrong's brother brandishing a handgun

at Wiggins, Wiggins and Miss Armstrong went shopping using the victim's credit cards. They went shopping again the next day in Mrs. Lacs' Chevette, purchasing a diamond ring at J.C. Penny's on Mrs. Lacs' credit card. On September 17th, they pawned a ring belonging to Mrs. Lacs. Miss Armstrong testified that Wiggins told her that he had found the car and that the credit cards belonged to his aunt.

On September 21, the police spotted Wiggins and Geraldine Armstrong driving Mrs. Lacs' Chevette. The Maryland Court of Appeals found that Wiggins made a statement to the police that Miss Armstrong "didn't have anything to do with this," and that he found Mrs. Lacs' car with the keys in it in a restaurant parking lot on September 16. According to that statement, the credit cards were in a bag on the floor, and Mrs. Lacs' ring was on the floor of the car. Wiggins was arrested and the police found a rubber glove in his pocket. A piece of this glove was tested for residual traces of the cleaners found in Mrs. Lacs' apartment. None were found. Wiggins admitted to using the credit cards and pawning the ring.

The State endeavored to prove that Wiggins admitted murdering Mrs. Lacs by offering the testimony of two inmates who were incarcerated along with Wiggins. The first inmate, John McElroy, testified that Wiggins told him that he hit Mrs. Lacs in the head with a bat, put her in the bathtub, and made off with $15,000 from her home. On cross examination, Wiggins' counsel elicited testimony that McElroy had a long history of PCP use and was currently prescribed to take Elavil, a mood altering drug.

The second inmate, Christopher Turner, testified that Wiggins told him that he had stolen Mrs. Lacs' car, beaten and

kicked her, then drowned her in the bathtub with lye or some other chemical in the water. Turner testified that Wiggins admitted to him that he had stolen the car, taken Mrs. Lacs' credit cards, money, and a ring from her finger, that he had used the credit cards to buy clothes and jewelry, and that he let his girlfriend use the credit cards. On cross examination, Wiggins' counsel elicited testimony that Mr. Turner had a long history of exchanging information to law enforcement for leniency, was suffering from active psychosis, and had entered into an agreement to limit sentencing on pending matters in exchange for his testimony.

The defense called an expert in forensic pathology, Dr. Gregory Kauffman, to challenge the State's theory of the cause of death (drowning) and also to establish that at the time of discovery and photography of the body on September 17, Mrs. Lacs had been dead no more than 18 hours. Dr. Kauffman asserted that drowning was unlikely because there were no signs of a struggle, but agreed that the death was a homicide. Finally, he testified that, within a reasonable degree of medical certainty, Mrs. Lacs' time of death was no earlier than 3 a.m. on Saturday, September 17.

At the close of the case, Judge Hinkel found Wiggins guilty of the murder of Mrs. Lacs, robbery, and theft. In his ruling, Judge Hinkel indicated that he did not believe either McElroy or Turner. He found that Wiggins was at Mrs. Lacs' apartment building "at a relevant time", that Mrs. Lacs died sometime on Thursday, September 15, and not any later. The judge also believed to be due to mistaken memory the evidence that Edith Vassar gave regarding the telephone call on the 16th and Elizabeth Lane's missing person's report, indicating that Mrs. Lacs was wearing a red dress on the 15th. In closing, the judge remarked, "[t]he defense argues that any presumption

that he is the robber is rebutted by the testimony of Miss Vassar, but my decision is not based on any presumption arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption."

Wiggins chose a jury for sentencing. Instead of developing a case in mitigation based on Wiggins' social history, defense counsel chose to question the essential fact that Wiggins was not the actual killer.[2] Defense counsel conceded that Wiggins had indeed been convicted of murder, but implored the jury that it might be "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins," and therefore, Wiggins was not a principal in the first degree, eliminating his eligibility for the death penalty. The defense introduced no mitigating evidence other than the stipulated statutory mitigating factor that Wiggins had no prior violent convictions. The jury sentenced Wiggins to death. The Maryland Court of Appeals affirmed the conviction and sentence, the sentence by a divided court. *Wiggins v. State*, 324 Md. 551, 597 A.2d 1359, 1367 (Md. 1991).

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[2] Under the Maryland statutory scheme, the proof concerning guilt required at a capital sentencing hearing is different from the proof required at the guilt or innocence stage of the trial. At the guilt or innocence stage, the State must prove beyond a reasonable doubt that the defendant is guilty of first degree murder. However, at the sentencing stage, the State must show beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. In other words, under Maryland law, he must be a principal in the first degree. See Md. Code Art. 27, § 413(e)(1); Md. Rule 4-343(3). "[T]he jury [at sentencing] still is required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer." *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 15 (Md. 1999).

Wiggins applied for state post-conviction relief, alleging that the failure to make out a case in mitigation based on his social history constituted ineffective assistance of counsel. In the state proceeding, Wiggins' counsel presented a social history report detailing Wiggins' history of physical, sexual, and mental abuse at the hands of his parents and guardians, and that his IQ indicated borderline mental retardation. From the bench, the court stated that Wiggins' trial counsel may have been ineffective in that they failed to have a social history prepared for mitigation, but expressed no opinion as to whether he had suffered prejudice or whether the decision was justified. However, in its formal opinion, the court found that counsel had made a "tactical decision and it was reasonable." A divided Maryland Court of Appeals affirmed. *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, 17 (Md. 1999).

Wiggins filed a timely 28 U.S.C. § 2254 petition in the district court. The district court found that the Maryland Court of Appeals had unreasonably applied the standard articulated in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), pertaining to sufficiency of the evidence challenges when it affirmed his convictions. See *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 554 (D. Md. 2001). Additionally, the district court found that Wiggins' counsel did not render effective assistance at sentencing. The district court based its decision in large part on the Supreme Court's recent decision in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), finding counsel ineffective for failure to investigate and present at sentencing his client's social history. The district court reasoned that "Wiggins's evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*," and concluded that Wiggins was entitled to relief. *Wiggins v. Corcoran*, 164 F. Supp. 2d at 557-60. The district

court explicitly found that Wiggins' case could not be distinguished on the ground that trial counsel had made a legitimate tactical decision because it found that a tactical decision to be reasonable must be based on a reasonable investigation which was not performed. *Wiggins,* 164 F. Supp. 2d at 558-59. The district court granted the petition, vacated the conviction and sentence, and ordered Wiggins released from the murder charge. 164 F. Supp. 2d at 576. However, the district court stayed its judgment pending our resolution of the State's appeal.

II. *Standard of Review*

As a result of the Antiterrorism and Effective Death Penalty Act's amendments to § 2254, our review of state criminal convictions is circumscribed. A federal court may only grant relief under § 2254 if it is shown that a decision of a state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently from [the Supreme] Court on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The "unreasonable application" grounds for granting the writ applies "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams,* 529 U.S. at 412- 13, 120 S. Ct. 1495. See also *Bell v. Jarvis,* 236 F.3d 149, 157 (4th Cir. 2000) (en banc). However, a writ of habeas corpus may not issue if the federal

court, in its own judgment, decides that the state court decision applied clearly established federal law merely "erroneously or incorrectly." *Vick v. Williams,* 233 F.3d 213, 216 (4th Cir. 2000) (citation omitted). Instead, we must decide if the state court's application of federal law was objectively unreasonable. 233 F.3d at 216. We have said that the criterion of reasonableness for purposes of § 2254(d)(1) is "whether the [state court's] determination is at least minimally consistent with the facts and circumstances of the case." *Bell v. Jarvis,* 236 F.3d at 159 (quoting *Wright v. Angelone,* 151 F.3d 151, 157 (4th Cir. 1998) (citation omitted)).

Both of Wiggins' contentions here implicate the "unreasonable application" ground for relief under § 2254(d)(1) because the Maryland Court of Appeals identified the correct principles governing Wiggins' claims from Supreme Court precedent. We review *de novo* the district court's decision on a § 2254 petition based on a state court record. *Spicer v. Roxbury Correctional Institute,* 194 F.3d 547, 555 (4th Cir. 1999). Therefore, we must decide for ourselves whether the Maryland Court of Appeals unreasonably applied clearly established federal law as determined by the Supreme Court.

III. *Wiggins'* Jackson v. Virginia *Claim*[3]

In *Jackson v. Virginia,* the Supreme Court stated that the "critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The question to be answered in applying the standard is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S. Ct. 2781 (italics in original). Conflicting inferences presented by the facts in the historical record are presumed to have been resolved in favor of the prosecution "even if it does not affirmatively appear in the record, and we must defer to that resolution." *Jackson,* 443 U.S. at 326, 99 S. Ct. 2781; *Wright v. West,* 505 U.S. 277, 297, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). The Maryland Court of Appeals identified these

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[3] Although *Jackson* announced the appropriate standard for sufficiency of the evidence review in habeas corpus cases, the Maryland court of appeals found it applicable to direct appeals in *Tichnell v. State,* 287 Md. 695, 415 A.2d 830, 842 (Md.1980), and subsequently applied it on direct appeal of Wiggins' conviction. This is the same method of analysis utilized by the Supreme Court in *United States v. Powell,* 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984), a case on direct appeal. There the Court equated the "substantial evidence" standard of *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), also a direct appeal case, with *Jackson*'s rationality test. See *United States v. Powell,* 469 U.S. 57, 67, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984) ("Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt.") (citing *Glasser v. United States,* 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942), and *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

controlling principles of law correctly. *Wiggins v. State,* 597 A.2d at 1366-67. As stated above, it is our task to decide whether the state court's application of these precepts is unreasonable in this case: to do this we must decide whether the Court of Appeals' decision is minimally consistent with the historical record of facts. *Bell v. Jarvis,* 236 F.3d at 159. We conclude that it is; indeed, in our opinion, it is not only minimally consistent with, but fully supported by the record.

In deciding Wiggins' sufficiency claim on direct appeal, the Maryland Court of Appeals reviewed the trial court's findings of fact for clear error pursuant to state law and concluded that no such error was present. The Court stated that the trial judge "considered but rejected Wiggins's argument that the circumstances taken together, demonstrated a reasonable hypothesis of innocence." *Wiggins v. State,* 597 A.2d at 1367.[4] Furthermore, the Court of Appeals concluded that the trial judge explicitly "did not credit any of Wiggins's evidence that the robbery and murder were committed at a time subsequent to his theft of the victim's car and other personal property." 597 A.2d at 1367. Lastly, the Court stated that the conflicting testimony regarding time of death did not render the trial court's ultimate conclusion of guilt clearly erroneous. As such, the Maryland Court of Appeals found that there was sufficient evidence for a rational trier of fact to conclude, as Judge Hinkel did, that Wiggins robbed and murdered Mrs. Lacs on September 15. 597 A.2d at 1367.

A recitation of the facts found by the trial judge and the

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[4] The Maryland rule which the trial judge considered in this case is more favorable to defendants than the federal rule. Compare *Wilson v. State,* 319 Md. 530, 573 A.2d 831, 834 (Md.1990), with *Jackson,* 443 U.S. at 320, 99 S. Ct. 2781.

inferences that could reasonably be drawn therefrom will demonstrate that the Maryland Court of Appeals applied *Jackson* reasonably.[5] Kevin Wiggins was working in Lacs'

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[5] The district court began its *Jackson* analysis by stating that only one piece of evidence supported an inference that Wiggins murdered Lacs, namely his possession of Mrs. Lacs' property. 164 F. Supp. 2d at 554. However, the court stated that Wiggins' conviction could not be sustained on that basis, because the trial judge had refused to draw that very inference. Stating that the Maryland Court of Appeals appeared to rely on that inference to affirm, the district court reasoned that it would be a violation of due process "for an appellate court, in affirming a conviction, to rely upon an inference that is only permissible and that was expressly rejected by the finder of fact." Accordingly, the district court proceeded to examine the record facts for other evidence of guilt, finding none. The district court, however, misapprehended the finding of the Maryland trial court and also the decision of the Maryland Court of Appeals. To repeat, what Judge Hinkel decided with respect to the recently stolen property follows:

> The defendant of course is in possession of recently stolen property. The defense argues that any presumption that he is the robber is rebutted upon testimony of M.S. Vassar, but my decision is not based on any presumption arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption. [J.A.550]

So the district court found that the Maryland trial court did exactly what the Maryland trial court did not do. It laid off the finding of the Maryland trial court solely to possession of Mrs. Lacs' property which had been recently stolen, the very thing that Judge Hinkel did not do, rather basing his decision on "all the evidence that I have weighed in this case and not by any presumption." Although we cannot know all the mental processes of Judge Hinkel, it may well be that he was aware of such cases as *West v. State,* 312 Md. 197, 539 A.2d 231 (Md.1988), in which the recent possession of a stolen money order after a purse snatching sufficed to support the crime of receiver but not stealing the money order. However that may be, and whatever the presumption may be in Maryland, Judge Hinkel did not rely on it, rather, as noted, he relied on "all the evidence that I have weighed in this case and not by any presumption." Judge Hinkel's

building on September 15, 1988. Wiggins was dismissed from work at or about 4:30 p.m. on that day. Wiggins had no legitimate reason to stay at work after the time his supervisor dismissed him, however, he returned to the building sometime after 4:30 p.m. While in the building, Wiggins was seen near Mrs. Lacs' apartment by Chianti Thomas, who also testified that Wiggins and Mrs. Lacs briefly conversed. When Wiggins returned from the building some 30 minutes later, he told his supervisor that he moved some sheetrock in the apartment building. This job, according to Wiggins' supervisor, would only have taken "a couple of minutes." Later that same night, Wiggins was found in possession of Mrs. Lacs' credit cards, her ring, and her car. There was evidence that Wiggins' girlfriend, who came with him that evening of September 15th, forged Mrs. Lacs' name to the credit card slips, while accompanied by Wiggins. The trial court could reasonably have drawn several inferences from these facts, that Wiggins was in the vicinity of Ms. Lacs' apartment sometime around 5:00 p.m. on the evening of September 15th, that he had ample

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trial decision as to consideration of the evidence was consistent with the direction in *Jackson* as to the review of evidence, that:

> the factfinder's role as weigher of the evidence is preserved through a conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. 443 U.S. at 319, 99 S. Ct. 2781 (italics in original).

And this quotation from *Jackson* was more recently repeated in *Wright v. West,* 505 U.S. 277, 296, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992). The fact that the Maryland trial court did not rely on any presumption, in our opinion, did not prevent that court from its reliance on all of the evidence in the case, which included, among many other items, the fact that Mrs. Lacs' automobile, credit cards, and ring had been stolen at a time contemporaneous with her murder and that Wiggins was present at her house at that time.

time to steal Mrs. Lacs' property, approximately 30 minutes, and that his return to explain his presence on the job site was pre-textual.

The time of death was not established to a reasonable medical certainty by medical testimony at trial. In fact, the conclusions of the medical experts were discounted by the trial judge. However, that the time of death was not established to any scientific certainty is of little moment because ample evidence supported the conclusion that Mrs. Lacs was killed on the evening of September 15, thus implicating Wiggins in more than mere theft or robbery. First, there was the testimony of Mrs. Lacs' friends regarding her attire the last time she was seen alive. The testimony established that Mrs. Lacs was wearing a blue skirt, white blouse, and white beads when she was seen at her regular card game on the 15th. This was the same outfit that she was wearing when she was found dead on the 17th.[6] Furthermore, there was evidence that Mrs. Lacs had marked certain television programs of apparent interest in her *TV Guide,* and the last markings in the *TV Guide* were for September 15. As stated above, other testimony established that Mrs. Lacs was last perceived alive[7] on September 15,

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[6] This testimony was not without contradiction. Mary Elgert filed a missing persons report indicating that Mrs. Lacs was wearing a white blouse and red skirt when she was last seen on Thursday. The trial judge explicitly resolved the conflicting testimony in favor of the prosecution stating that Mrs. Elgert's recollection was simply wrong. It is the exclusive province of the trier of fact, save only for clear error, to resolve conflicting facts and credibility determinations at trial. The Maryland Court of Appeals reviewed the record evidence for clear error and found none. Nor is there any evidence that we can see that would indicate a result to the contrary.

[7] Edith Vassar testified that she received a call from Florence Lacs on the morning of September 16. The trial judge explicitly found that Mrs. Vassar did not correctly remember.

sometime between 4:00 and 5:00 p.m. when Chianti Thomas heard Wiggins thank Mrs. Lacs for watching some sheetrock for him. It was only a few hours later that Wiggins picked up Miss Armstrong in Mrs. Lacs' car and the two began using Mrs. Lacs' credit cards. Adding all the circumstances together, the trial judge concluded that Florence Lacs' robbery and murder occurred on the evening of September 15th and that Wiggins, being there at "a relevant time," was the robber and murderer. On this basis, the Maryland Court of Appeals found *Jackson v. Virginia* satisfied. We are of opinion and decide that the Maryland Court of Appeals' decision was not only at least minimally consistent with the record of facts found by the trial judge and thus was not unreasonable within the meaning of § 2254(d), it was fully supported by the record. Accordingly, we reverse the district court's grant of Wiggins' petition on this issue.

IV. *Wiggins'* Strickland *Claim*

We review Wiggins' claim *de novo* applying the same standard prescribed by § 2254(d) and find that the Maryland court's decision was a reasonable application of *Strickland. Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), establishes a two component, conjunctive test for ineffectiveness of counsel claims; namely that counsel's performance was deficient and that such performance prejudiced the defense. To establish deficient performance the defendant must show that counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687, 104 S. Ct. 2052. The reasonableness inquiry proceeds based on all of the facts and circumstances of the case "viewed as of the time of counsel's conduct." 466 U.S. at 690, 104 S. Ct. 2052. This performance prong is highly deferential to counsel's choices, and informed strategic decisions are virtually unchallengeable.

466 U.S. at 690, 104 S. Ct. 2052. A defendant "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" 466 U.S. at 489, 104 S. Ct. 1949 (quoting *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1955)). To establish prejudice, the defendant must show that but for counsel's deficient performance "there is a reasonable probability that . . . the result of the proceeding would have been different." 466 U.S. at 688, 104 S. Ct. 2052. A reasonable probability is one "sufficient to undermine confidence in the outcome of the proceeding." 466 U.S. at 694, 104 S. Ct. 2052. The Maryland Court of Appeals analyzed Wiggins' ineffectiveness claim under this standard. *Wiggins v. State,* 352 Md. 580, 724 A.2d 1, 12 (Md. 1999).

The district court found that Wiggins did not receive effective assistance of counsel at sentencing because his counsel failed to develop a social history exposing Wiggins' harsh childhood and sub-average mental capacity.[8] The district court decided that the Court of Appeals was unreasonable in its analysis of Wiggins' claim because it was purportedly "almost directly contrary to the Supreme Court's recent decision in *Williams v. Taylor.*" *Wiggins v. Corcoran,* 164 F. Supp. 2d at 557 (citation omitted). Upon its independent review of the claim, the district court found for Wiggins on the claim and thus granted his § 2254 petition on this aspect of the petition, as well as that the evidence did not support the judgment of conviction.

In *Williams v. Taylor,* counsel began preparing for sentencing one week before the proceeding and failed utterly to

[8] The district court did *not* find counsel ineffective with respect to the conviction, only as to the sentencing.

prepare any social history because of a misapprehension of state law regarding access to juvenile records. *Williams,* 529 U.S. at 395, 120 S. Ct. 1495. That social history would have disclosed a wealth of potentially mitigating evidence grounded in Williams' "nightmarish" childhood, as well as his being "borderline mentally retarded." In other words, counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice. It was this wholesale failure that led the Court to conclude that Williams did not receive constitutionally sufficient representation. *Williams,* 529 U.S. at 396, 120 S. Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)).

We think that despite any superficial similarities to the instant case, the district court's reliance on *Williams v. Taylor* to find the Maryland Court of Appeals' decision unreasonable was misplaced. First, *Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. *Williams,* 529 U.S. at 393, 120 S. Ct. 1495; see also, e.g., *Penry v. Lynaugh,* 492 U.S. 302, 327-28, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland,* and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. See *Strickland,* 466 U.S.

at 691, 104 S. Ct. 2052. Secondly, even if *Williams* did establish such a *per se* rule, it would not have been "clearly established" within the meaning of § 2254, as the *Williams* case was decided more than a year after the Maryland Court of Appeals' decision here. See *Booth-El v. Nuth,* 288 F.3d 571 (4th Cir. 2002). Finally, despite the district court's contention to the contrary, we are of opinion that Wiggins' counsel made a reasonable strategic decision and neither *Williams,* as it may apply here, nor any of *Strickland*'s other progeny, require a different conclusion.

Wiggins' sentencing counsel, Mr. Schlaich, did know about Wiggins' difficult childhood, as the district court acknowledged. *Wiggins v. Corcoran,* 164 F. Supp. 2d at 559. During the evidentiary hearing in the Maryland courts, Mr. Schlaich stated that he knew of some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen. He knew, for example, that Wiggins had been removed from his natural mother as a result of a finding of neglect and abuse; that there were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded. So any inference that his knowledge and investigation was merely casual or offhand is simply not so. Although further investigation would have developed more extensive details of Wiggins' childhood, the extant records did inform Schlaich of a possible avenue of mitigation. The district court concluded, however, that the knowledge Schlaich gained through these reports put him on notice and required him to inquire further. This was error. When considering claims of ineffectiveness, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled."

Burger v. Kemp, 483 U.S. 776, 794, 107 S. Ct. 3114, 97 L. Ed. 2d 638 (1987) (quoting *United States v. Cronic,* 466 U.S. 648, 665, n. 38, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). In this connection, the Supreme Court has indicated that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support limitations on investigation." *Burger v. Kemp,* 483 U.S. at 794, 107 S. Ct. 3114. The Maryland Court of Appeals determined that Schlaich's knowledge of potential mitigation avenues was sufficient to make an informed strategic choice. We think that the Maryland Court of Appeals' decision in this regard was reasonable.

The attorneys viewed the case against Wiggins at the guilt phase to be quite flimsy. Furthermore, because of the conflicting medical testimony as to time of death, the lack of direct physical evidence affirmatively placing Wiggins in Florence Lacs' apartment, and existence of other evidence, such as the Ryder hat found in Mrs. Lacs' apartment, Schlaich "believed that [Wiggins'] best hope of escaping the death penalty was for one or more of the jurors to entertain a reasonable doubt as to," 724 A.2d at 15, whether Wiggins was the actual killer. Add to that the stipulated fact of Wiggins' clear record. On the other hand was Wiggins' social history. As stated above, Schlaich had knowledge of some of Wiggins' social history from the presentence investigation report and social services records and likely knew that additional development would have resulted in more sordid details surfacing. Nonetheless, Schlaich decided that social history evidence was problematic in that it tended to conflict with any attack on principalship: Counsel would present a picture to the jury of an innocent man, notwithstanding his murder conviction, and then, to the same factfinder, argue that if he was the principal, then the jury should be lenient because of his

difficult childhood. Schlaich was aided by the fact that the guilt trial had not been before the jury, which was an advantage, as the Maryland Court recognized. 724 A.2d at 16-17. Alternative arguments are common in the law, but there is no authority that requires that an attorney use them. Indeed, the choice between arguments, limited, perhaps by the client's express wishes, seems to be the very essence of counsel's function in any context. Cf. *Jones v. Barnes,* 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (holding that defense counsel assigned to prosecute appeal from criminal conviction does not have constitutional duty to raise every nonfrivolous issue requested by defendant).

Finally, we note that there is nothing in *Strickland* or its progeny to suggest that even if Schlaich had investigated further that he would have been required to present the evidence thus developed in addition to, or instead of his chosen strategy. On the contrary, the Supreme Court has found it reasonable to rely on other strategies during capital sentencing proceedings notwithstanding counsel's possession of other mitigating evidence, especially where that evidence is equivocal. See *Burger v. Kemp,* 483 U.S. at 792-93, 107 S. Ct. 3114 (1987) (failure to put on unhappy childhood evidence reasonable where helpfulness was in doubt); *Darden v. Wainwright,* 477 U.S. 168, 186, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (counsel's failure to put on psychiatric mitigating evidence reasonable where such evidence may have opened door to prosecution to rebut with evidence of capability to commit the crime charged). The Supreme Court has held that counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped. *Darden,* 477 U.S. at 186-87, 106 S. Ct. 2464; see also *Howard v. Moore,* 131 F.3d 399, 421 (4th Cir. 1997) (en banc). Indeed, whether a particular bit of evidence is mitigating is often "in the eye of

the beholder." *Burger v. Kemp,* 483 U.S. at 794, 107 S. Ct. 3114 (citation and internal quotation marks omitted). Likewise, in this case, not all of the available social history evidence is unequivocally mitigating. Here, the jury could just as easily have viewed Wiggins' childhood and limited mental capacity as an indicator of future lawlessness. See, e.g., *Barnes v. Thompson,* 58 F.3d 971, 980-1 (4th Cir. 1995) (failure to introduce evidence of childhood abuse or mental impairment not ineffective where counsel concluded evidence could have been used by jury to make finding of future dangerousness).

As we have stated, "[t]rial counsel is too frequently placed in a no-win situation with respect to possible mitigating evidence at the sentencing phase of a capital case. The failure to put on such evidence, or the presentation of evidence which then backfires, may equally expose counsel to collateral charges of ineffectiveness. The best course for a federal habeas court is to credit plausible strategic judgments in the trial of a state case." *Bunch v. Thompson,* 949 F.2d 1354, 1364 (4th Cir. 1991). The district court failed to heed this admonition. Schlaich stated that he chose to focus on one theory of Wiggins' case at sentencing because the "shotgun approach" often confuses the issues and works to the detriment of the defendant. In Schlaich's professional judgment, then, avoidance of conflicting arguments supported limited investigation into social history. The Maryland Court of Appeals found his judgment sound on the basis of the factual record before it, and even if we were of opinion that the Maryland Court's decision was in error, we cannot say that it was unreasonable.

We are of opinion that the Maryland Court of Appeals' decision regarding Wiggins' ineffectiveness claim was

reasonable.[9] Therefore, we reverse the district court's grant of Wiggins' petition on this ground also.

V.

The judgment of the district court is accordingly

REVERSED.

WILKINSON, Chief Judge, concurring:

I concur in the opinion of the court. Under the AEDPA standard of review, and given the parameters of the *Jackson* and *Strickland* claims themselves, our role is a circumscribed one. Judge Widener has set forth the record evidence with admirable care, and I am satisfied that there is no basis in law or fact to overturn the judgment of the Maryland state system.

My own view is that petitioner very probably committed the heinous offense for which he stands convicted. But I cannot say with certainty that he did so.* However, it is for the Governor to determine the extent to which the lack of total certitude should inform the exercise of discretion under Md. Code Ann., Corr. Servs. § 7-601 and Md. Const. art. II, § 20. To confuse the rule of law here with the role of clemency would only do a disservice to both.

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[9] Because we find that the Maryland Court of Appeals' decision regarding ineffectiveness was reasonable, we need not address the second prong in the *Strickland* analysis.

* In addition to the strong incriminating evidence, there are also the unexplained items noted by Judge Widener--namely, the unidentified fingerprints, baseball cap, fibers, and hairs. Further, the petitioner had no prior record.

NIEMEYER, Circuit Judge, concurring:

The court's opinion in this case fully states the record evidence and persuasively demonstrates why the State court did not act unreasonably in applying *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), to deny Wiggins relief on his first claim. As an additional reason for reaching this conclusion, I would note that from the condition of Florence Lacs' apartment, a reasonable jury could find, beyond a reasonable doubt, that whoever ransacked Florence Lacs' apartment and robbed her also murdered her. Because the evidence convincingly points to the fact that Wiggins robbed Lacs on April 15 and, within hours, was using the products of this robbery, the jury could reasonably find that Wiggins also murdered Lacs. Wiggins' only explanation--that he found Lacs' Chevrolet *on September 16* with the keys, credit cards, and a diamond ring in it--is belied by the fact that Wiggins is directly linked to the car and the credit cards during the evening of *September 15.*

I find the question of whether the State court reasonably applied *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), to conclude that Wiggins received adequate assistance of counsel during the sentencing phase of his trial to be a closer call. Both of my colleagues are satisfied that the decision not to introduce mitigating evidence was consistent with a strategic decision made by Wiggins' counsel not to imply any confession of guilt and to seek to have the jury hesitate on the death sentence because of a hoped-for hesitation on liability. It appears to me, however, that counsel could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence. But

in the end, this may be only a luxury of hindsight. There is support in the record from which to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue. With less confidence, therefore, I also concur in the court's opinion that the State court reasonably concluded that Wiggins was provided effective assistance of counsel during the sentencing phase of his trial.

In short, because the State court's refusal to grant relief was neither contrary to clearly established federal law, as determined by the Supreme Court, nor involved an unreasonable application of that law, *see* 28 U.S.C. § 2254(d)(1), I agree that Wiggins' petition should have been denied by the district court. Therefore, I concur in the thorough opinion prepared for the court by Judge Widener.

Appendix B

JUDGMENT

FILED: May 2, 2002

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 01-23
CA-99-2420-JFM

KEVIN WIGGINS
Petitioner - Appellee

v.

THOMAS R. CORCORAN, Warden, Maryland Correctional Adjustment Center; WILLIAM W. SONDERVAN, Commissioner of Corrections of the State of Maryland; J. JOSEPH CURRAN, JR.
Respondents - Appellants

Appeal from the United States District Court for the District of Maryland at Baltimore

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In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court.

/s/ Patricia S. Connor
CLERK

Appendix C

United States District Court,
D. Maryland.

Kevin WIGGINS
v.
Thomas R. CORCORAN, Warden William Sondervan, Commissioner of Corrections J.
Joseph Curran, Jr., Attorney General, State of Maryland

No. JFM-99-2420.
Sept. 18, 2001.

Donald B. Verrilli, Jr., Washington, DC, for Kevin Wiggins.

Ann N. Bosse, J. Joseph Curran, Jr., Office of Atty. Gen., Baltimore, MD, for Thomas R. Corcoran, William Sondervan, J. Joseph Curran, Jr.

OPINION

MOTZ, District Judge.

More than twelve years ago, the body of seventy-seven year old Florence Lacs was found in the bathtub of her garden apartment. The medical examiner determined the manner of death was homicide caused by drowning. Her car and credit cards were missing but later recovered in the possession of Kevin Wiggins.

Now before this Court is a petition for writ of habeas

corpus brought under 28 U.S.C. § 2254 by Wiggins,[1] who was sentenced to death by a jury after having been found guilty of the murder of Mrs. Lacs by the Honorable J. William Hinkle in a non-jury trial. Wiggins asserts, *inter alia,* that the evidence was constitutionally insufficient to sustain his conviction and that his trial counsel was constitutionally ineffective in failing to present mitigation evidence during his sentencing proceeding. Both claims have been exhausted, and both are meritorious.[2] Therefore, Wiggins's petition will be granted.

I. *History of the Case*

On October 20, 1988, Wiggins was indicted in the Circuit Court for Baltimore County on charges of first degree murder, robbery, theft and burglary. (*See* Paper No. 3, Exhibit 2 at 1). On December 8, 1998, the State filed notice of intention to seek the death penalty. (*Id.,* Exhibit 1 at 2). Wiggins, who opted to be tried before a judge, was represented at trial and sentencing by Michelle Nethercott and Carl Schlaich. On August 4, 1989, Judge Hinkel found Wiggins guilty of first degree murder, robbery, and two counts of theft. (*Id.,* Exhibit 1 at 7-9 and Exhibit 6 at 135-140).

Wiggins elected to be sentenced by a jury. (*Id.,* Exhibit 1 at 12-13 and Exhibit 7 at 142-59). After four days of proceedings, a jury determined that he was a principal in the first degree murder of Mrs. Lacs, and that the appropriate

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[1] Questions concerning the need for expansion of the record and an evidentiary hearing, briefed by counsel in additional submissions, have been resolved. *See* Paper Nos. 18 and 19.

[2] The merits of the remaining issues raised in the petition, presented by the parties in submissions docketed as Paper Nos. 1, 3, 5, 7 and 9, are addressed herein.

penalty was death. (*Id.*, Exhibit 1 at 1 and 13 and Exhibit 12 at 66-69). Accordingly, on October 18, 1989, Judge Hinkel noted the jury's verdict and also imposed a ten year term of incarceration for robbery and concurrent eighteen month sentences for the two theft convictions. (*Id.*, Exhibit 1 at 9 and 13 and Exhibit 12 at 71-72). Those sentences have now been fully served. A motion for new trial was subsequently heard and denied. (*Id.*, Exhibit 1 at 14 and Exhibit 13).

Wiggins, through counsel,[3] argued on direct appeal to the Maryland Court of Appeals that

(1) the evidence presented at trial was insufficient to establish that he perpetrated the crimes;

(2) the trial court erred in denying his motion for new trial;

(3) the evidence presented at sentencing was insufficient to support a finding that he was a principal in the first degree;

(4) the trial court erred in excluding mitigating evidence that the State had made a plea offer of a life sentence;

(5) the trial court erred in excluding other mitigating evidence at sentencing;

(6) the trial court erred in denying petitioner's right of allocution;

(7) the trial court erred in denying his motion for a bifurcated sentencing hearing;

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[3] On direct appeal, Wiggins was represented by Julia Doyle Bernhardt and Melissa Moore.

(8) the trial court erred in admitting irrelevant evidence relating to the victim's *TV Guide* magazines;

(9) the trial court erred in admitting victim impact evidence at sentencing;

(10) the death sentence was excessive and disproportionate to the sentences imposed in similar cases, considering the nature of the crime and the defendant;

(11) the Maryland death penalty statute is unconstitutional; and

(12) the trial court erred in imposing separate sentences for the two theft convictions.

(*Id.*, Exhibit 15 at 2-3). In a reported opinion dated November 8, 1991, the appellate court affirmed all but the theft-related counts of the judgment against him. (*Id.*, Exhibit 26); *see also Wiggins v. State*, 324 Md. 551, 597 A.2d 1359 (Md. 1991). Wiggins sought *certiorari* as to one issue, to wit

> "[w]hether the exclusion of relevant mitigating evidence at petitioner's capital sentencing proceeding that the state had offered a life sentence in exchange for a plea of guilty and that the death penalty is imposed infrequently in Maryland in like cases violated the Eighth and Fourteenth Amendments."

(*Id.*, Exhibit 27 at iii). On April 27, 1992 the United States Supreme Court denied review. (*Id.*, Exhibit 29); *see also Wiggins v. State*, 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992).

In January, 1993, Wiggins sought post conviction relief in

the Baltimore County Circuit Court, raising 38 claims embodying 52 issues. After a hearing, the Honorable John F. Fader II denied relief on all grounds in a 257-page decision filed on October 22, 1997. (*Id.*, Exhibit 1 at 19 and Exhibit 40). In his petition for leave to appeal filed before the Court of Appeals, Wiggins alleged that:

(1) trial counsel provided ineffective assistance at sentencing by failing to investigate and introduce mitigating evidence concerning his traumati background and mental problems;

(2) trial counsel provided ineffective assistance at the guilt/innocence phase of trial by failing to adduce evidence of the medical examiner's prior inconsistent opinion regarding time of death;

(3) trial counsel provided ineffective assistance by failing to secure a forensic expert for trial, thus handing him the choice of going to trial without a jury or proceeding before a jury without an expert;

(4) trial counsel failed to investigate and develop evidence regarding jury selection procedures in Baltimore County;

(5) the prosecutor failed to disclose an agreement with one of its witnesses regarding lenient treatment in exchange for testimony; and

(6) the evidence was insufficient to find him guilty of first degree murder and to establish that he was a first degree principal in the murder.

(*See* Paper No. 3, Exhibits 44-46). Wiggins's request for leave to appeal was denied on February 10, 1999 in a reported

opinion. *Wiggins v. State*, 352 Md. 580, 724 A.2d 1 (Md. 1999). (*See* Paper No. 3, Exhibit 50). On *certiorari*, petitioner sought review as to whether:

(1) trial counsel in a capital case are under a Sixth Amendment duty to investigate mitigating evidence about a defendant's background and character in advance of making a "tactical" decision not to present such evidence at sentencing, and are likewise under a Sixth Amendment duty to present such mitigating evidence at sentencing if the evidence is in no respect inconsistent with counsel's "tactics" at sentencing;

(2) the Sixth Amendment right to effective assistance of counsel is denied when trial counsel fail to impeach a key state witness at trial with a prior inconsistent statement that reveals the State's theory of the case to be scientifically impossible; and

(3) the Sixth Amendment right to effective assistance of counsel is denied where trial counsel, after objecting to the composition of the sentencing jury, fail to introduce any evidence to support the objection, and in particulate fail to introduce evidence that would have shown that six out of ten African Americans residing in the jurisdiction were excluded from the jury pool.

(*See* Paper No. 3, Exhibit 51 at i). *Certiorari* was denied. *See Wiggins v. Maryland*, 528 U.S. 832, 120 S. Ct. 90, 145 L. Ed. 2d 76 (1999).

In the instant petition, his first in federal court, Wiggins asserts that:

A. he did not knowingly and voluntarily waive his right to a jury trial;

B. the evidence was not sufficient to sustain his murder conviction;

C. the trial court erred in denying his motion for new trial;

D. the prosecution failed to disclose exculpatory evidence;

E. counsel at the guilt/innocence phase of trial rendered ineffective assistance;

F. unreliable identification evidence was improperly admitted at trial;

G. the grand jury and sentencing jury were selected in a manner that violated the Sixth Amendment's fair cross-section guarantee and the Fourteenth Amendment's equal protection clause;

H. voir dire of the jurors was inadequate;

I. the trial court wrongly excused prospective jurors;

J. the evidence was insufficient to support the sentencing jury's finding of the aggravating factor of murder committed in the course of a robbery;

K. the evidence was insufficient to support the sentencing jury's finding that he was a principal in the first degree;

L. the court at sentencing erred in several of its evidentiary rulings;

M. the court erred in instructing the jury;

N. counsel at sentencing rendered ineffective assistance;

O. it is unconstitutional to impose capital punishment on a mentally retarded individual;

P. application of the death penalty in Maryland is arbitrary;

Q. the death penalty is excessive punishment in all cases; and

R. counsel on direct appeal rendered ineffective assistance.

(*See* Paper No. 1 at 11-37).

II. *Threshold Considerations*

Statute of Limitations

Respondents do not contend--and the Court does not find--that the petition is time-barred pursuant to 28 U.S.C. § 2244(d).

Exhaustion of State Remedies and Procedural Default

Before a petitioner may seek habeas relief in federal court, he must exhaust each claim presented to the federal court by pursuing remedies available in state court.[4] *See Rose v. Lundy*, 455 U.S. 509, 521, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982). This exhaustion requirement is satisfied by seeking review of the claim in the highest state court with jurisdiction to consider

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[4] The claim must be fairly presented to the state courts. This means presenting both the operative facts and controlling legal principles. *Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir.2000) (citations omitted).

the claim. *O'Sullivan v. Boerckel,* 526 U.S. 838, 842, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999); 28 U.S.C. § 2254(b) and (c). In Maryland, this may be accomplished by raising certain claims on direct appeal and with other claims by way of a post conviction proceedings. Exhaustion is not required if at the time a federal habeas corpus petition is filed the petitioner has no available state remedy. *Teague v. Lane,* 489 U.S. 288, 297-98, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989); *Bassette v. Thompson,* 915 F.2d 932, 937 (4th Cir. 1990).

Where a petitioner has failed to present a claim to the highest state court with jurisdiction to hear it, whether it be by failing to raise the claim in post conviction proceedings or on direct appeal or by failing to timely note an appeal, the procedural default doctrine applies.[5] *Coleman v. Thompson,* 501 U.S. 722, 749-50, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh'g denied* 501 U.S. 1277, 112 S. Ct. 27, 115 L. Ed. 2d 1109 (failure to note timely appeal); *Murray v. Carrier,* 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) (failure to raise claim on direct appeal); *Murch v. Mottram,* 409 U.S. 41, 46, 93 S. Ct. 71, 34 L. Ed. 2d 194 (1972) (failure to raise claim during post conviction); *Bradley v. Davis,* 551 F. Supp. 479, 481 (D. Md. 1982) (failure to seek leave to appeal denial of post conviction relief).

Procedural default also may occur where a state court declines "to consider the merits [of a claim] on the basis of an

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[5] The procedural default doctrine applies where a state court refuses to consider the merits of a claim on procedural grounds or where procedural grounds would clearly bar consideration of the claim by a state court. *Teague,* 489 U.S. at 297-98, 109 S. Ct. 1060. It does not apply if a state court fails to apply the bar and considers the merits of a claim. *County Court of Ulster v. Allen,* 442 U.S. 140, 154, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

adequate and independent state procedural rule." *Yeatts v. Angelone,* 166 F.3d 255, 260 (4th Cir.), *cert. denied,* 526 U.S. 1095, 119 S. Ct. 1517, 143 L. Ed. 2d 668 (1999). Maryland's requirement that certain claims be presented on direct appeal, *see* Md. Ann. Code Art. 27, § 645A(c), constitutes an adequate and independent state procedural rule. *Johnson v. Smith,* 981 F. Supp. 944, 948 (D. Md. 1997).

The procedural default doctrine bar, however, is not absolute. Where a petitioner shows cause and prejudice for such default, or demonstrates actual innocence, federal habeas corpus review may be appropriate, notwithstanding default. *Murray,* 477 U.S. at 495, 106 S. Ct. 2639; *Wainwright v. Sykes,* 433 U.S. 72, 86, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

Cause for procedural default must be more than mistake or ignorance. Under some circumstances, ineffective assistance of counsel as determined under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) may be cause.[6] *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Otherwise, "in order to demonstrate 'cause' for the default [petitioner] must establish that 'some objective factor external to the defense impeded counsel's [or petitioner's] efforts' to raise the claim in state court at the appropriate time." *Breard v. Pruett,* 134 F.3d 615,

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[6] Ineffective assistance of counsel in proceedings such as post conviction, where representation by counsel is not constitutionally mandated, is not cause for a procedural default. *Coleman,* 501 U.S. at 752, 111 S. Ct. 2546. The fact that certain types of claims may only be raised in post conviction proceedings does not create a limited constitutional right to counsel in those proceedings which would permit ineffective assistance to constitute cause. *Mackall v. Angelone,* 131 F.3d 442, 449 (4th Cir. 1997), *cert. denied,* 522 U.S. 1100, 118 S. Ct. 907, 139 L. Ed. 2d 922 (1998).

620 (4th Cir. 1998) (quoting *Murray,* 477 U.S. at 488, 106 S. Ct. 2639). Ignorance of the availability of an appeal in a collateral proceeding, even when based on erroneous legal advice, is not cause for failing to file a timely appeal. *Tower v. Phillips,* 7 F.3d 206, 211 (11th Cir. 1993). In addition to showing cause, a petitioner must establish prejudice, i.e., that the errors alleged worked to his actual and substantial disadvantage and were of constitutional magnitude. *Carrier,* 477 U.S. at 492, 106 S. Ct. 2639; *Felton v. Barnett,* 912 F.2d 92 (4th Cir. 1990); *Waye v. Townley,* 871 F.2d 18 (4th Cir. 1989).

Even where a petitioner fails to show cause and prejudice for a procedural default, a court must still consider whether it should reach the merits of the petitioner's claims in order to prevent a fundamental miscarriage of justice. *See Schlup v. Delo,* 513 U.S. 298, 314, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); *see also Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). The miscarriage of justice standard is directly linked to innocence. *Id.* at 320, 115 S. Ct. 851. Innocence is not an independent claim; rather, it is the "gateway" through which a petitioner must pass before a court may consider constitutional claims which are defaulted. *Id.* at 315, 115 S. Ct. 851. The miscarriage of justice exception applies where a petitioner shows that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Murray,* 477 U.S. at 496, 106 S. Ct. 2639. In capital cases, this showing requires a petitioner to show by clear and convincing evidence that but for constitutional error, no reasonable juror would have found petitioner eligible for the death penalty. *Sawyer v. Whitley,* 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992).

Here, respondents contend that twelve of the eighteen

claims raised in the petition are procedurally defaulted, in whole or in part. (*See* Paper No. 3 at 43-46; 47-49; 52-56; 65-67; 67-69; 70-71; 75-76; 120-121; 144; 145; 146 and 147). Inasmuch as this Court has determined that the evidence was constitutionally insufficient to sustain petitioner's murder conviction and that trial counsel was ineffective in failing to present mitigation evidence at sentencing, the case law cited above mandates federal habeas corpus review of most of the twelve otherwise-defaulted claims, as further elucidated herein. *Murray,* 477 U.S. at 496, 106 S. Ct. 2639.

III. *Standard of Review*

Effective April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2254(d) to provide that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim adjudicated on the merits in State court proceedings unless the adjudication of the claim:
>
> (1) resulted in a decision contrary to, or involved an unreasonable application of, clearly established, federal law as determined by the Supreme Court; or
>
> (2) resulted in a decision based on an unreasonable determination of the facts, in light of the evidence presented in the State court proceedings.

Under the AEDPA, federal courts no longer can correct error in state court proceedings, but must instead exercise a more limited review, set forth in 28 U.S.C. Section 2254(d)(1)

and (2) (as amended). The statute provides a new analytical framework for determining whether the state court's findings concerning a claim raised on federal habeas corpus review is correct.

Section 2254(d) now provides that:

> [a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

In *Lindh v. Murphy*, 521 U.S. 320, 333 n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), the Supreme Court characterized Section 2254(d) as a "new, highly deferential standard for evaluating state court rulings." In *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000), Justice O'Connor, speaking for the majority, further elucidated that standard, stating that:

> Section 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under Section 2254(d)(1), the

> writ may issue only if one of the following two conditions is satisfied--the state-court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id. at 412, 120 S. Ct. 1495. Justice O'Connor indicated that "the phrase 'clearly established Federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of th[e] Court's decisions as of the time of the relevant state-court decision." *Id.* Furthermore, she indicated that:

> [u]nder Section 2254(d)(1)'s "unreasonable application clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable."

Id. at 411, 120 S. Ct. 1495. In other words, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly

established federal law was objectively unreasonable." *Id.* at 409, 120 S. Ct. 1495. A decision is contrary to clearly established federal law if a state court applies a rule that contradicts Supreme Court precedent or if a state court "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a [different] result." *Id.* at 405-06, 120 S. Ct. 1495.

"A state court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular . . . case . . . [qualifies] as a decision 'involving an unreasonable application . . . of clearly established Federal law.'" *Id.* at 407-08, 120 S. Ct. 1495. Also, "a state determination may be set aside under this standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone,* 530 U.S. 156, 166, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (2000).

Thus, in reviewing Wiggins's attack on his state court conviction, this Court must presume that factual determinations made by the state court are correct. Wiggins then bears the burden of rebutting this presumption of correctness by clear and convincing evidence. *See* 28 U.S.C. Section 2254(e)(1).

IV. *Analysis of Issues Presented for Review*

Sufficiency of the Evidence (Claim B)

A.

Ms. Lacs, an elderly woman, was found drowned in the bathtub of her apartment at approximately 3:50 on the afternoon of Saturday, September 17, 1988. Testimony at trial

placed Wiggins near Lacs's apartment (perhaps in conversation with her) at approximately 5:00 on the afternoon of Thursday, September 15, 1988, when Ms. Lacs was last seen alive. Later that evening, Wiggins and his girlfriend, Geraldine Armstrong, used Lacs's credit cards and drove her car.[7] They did so again on Friday, and on Saturday they pawned a ring belonging to Ms. Lacs. Upon his arrest several days later, Wiggins falsely stated to the police that he had found Ms. Lacs's car with the credit cards and ring in it on the morning of Friday, September 16.

On its face this evidence appears compelling, and, particularly given the high degree of deference that must be given in federal habeas proceedings to the findings and rulings made by state courts, *see* 28 U.S.C. § 2254(d), it may seem surprising that I should find, as a matter of constitutional due process, that the evidence is not sufficient to sustain Wiggins's murder conviction. The governing standard of review aside, I have great respect for my state court colleagues and do not pretend to have greater acumen than they.[8] Nevertheless, I am

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[7] Aged forty-two at the time of the murder, Armstrong was fifteen years older than Wiggins. She was arrested with Wiggins and was subjected to a polygraph examination. According to the examiner, she answered dishonestly in response to questions about whether she had been in Ms. Lacs's apartment and participated in the robbery. Nevertheless, she became a witness for the State and was never prosecuted.

[8] I particularly note that though I find Judge Hinkel's thought process in finding Wiggins guilty to have been faulty, he should be commended for the honesty of his opinion. If I am correct in perceiving that Judge Hinkel deceived himself when he said that he was not relying upon any presumption arising from Wiggins's possession of the property recently stolen from Ms. Lacs, that is only because he straightforwardly set forth the reasons for his decision. Moreover, if Judge Hinkel had wanted to insulate his findings from review, he simply would have had to credit two of Wiggins's prison mates who testified that Wiggins confessed to them he had committed the

convinced that, when the record is carefully analyzed, no rational finder of fact could have found Wiggins guilty of murder beyond a reasonable doubt, and that to do so involved an unreasonable application of clearly established federal law. *See Williams,* 529 U.S. at 407-408, 120 S. Ct. 1495.

I start my analysis with the evidence I have just summarized. The fact that Wiggins was observed to be near Ms. Lacs's apartment and perhaps speaking with her outside the apartment the last time she was seen alive does not itself establish that he was her murderer. Nor does the fact that Wiggins made a false exculpatory statement to the police about when he came into possession of Ms. Lacs's car, credit cards, and ring prove his involvement in the murder. Wiggins would have had equal incentive to lie about when and how he came to use Ms. Lacs's property if he had merely stolen the property without murdering Ms. Lacs.[9] Therefore, the only piece of evidence that arguably can be said to give rise to an inference that Wiggins murdered Ms. Lacs is that he possessed the

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murder. Judge Hinkel expressly declined to follow that route.

[9] It should be noted that the record reveals that this hypothesis is not wholly conjectural or entirely implausible. One of the brothers of Wiggins's girlfriend, Geraldine Armstrong, had an apartment directly under the apartment of Ms. Lacs. Further, the trial testimony disclosed that another of Armstrong's brothers was involved in an angry confrontation with Armstrong and Wiggins on the evening of Thursday, September 15. It may be that if the robbery and murder occurred late in the afternoon or early in the evening of that day, one or both of the brothers may have been involved. Or it may be that Wiggins (who the record reflects was borderline mentally retarded) pilfered Ms. Lacs's keys and credit cards on Thursday afternoon, and that one or both of the brothers later returned to her apartment with the keys (borrowed or taken from Wiggins) and, in the course of looking for more loot, committed the murder. This hypothesis would be consistent with the testimony of Edith Vassar and physical evidence from the apartment, discussed *infra*.

property stolen from her shortly after she was last seen alive.

Wiggins's conviction cannot be sustained on the basis of that inference, however, for a very simple reason. Judge Hinkel expressly stated in his oral opinion finding Wiggins guilty that "my decision is not based on any presumption, arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption." An inference not drawn, or a presumption not relied upon, by the fact-finder is not a fact.[10] Accordingly, it is necessary to consider if there was other evidence upon which a rational finder of fact could have found Wiggins guilty beyond a reasonable doubt.

Proof that Ms. Lacs had died between 5:00 p.m. on Thursday, September 15, and 7:45 that evening--when, according to trial testimony, Wiggins was first observed driving her car--would certainly have sufficed. No witness, however, was able to testify on the basis of personal knowledge when Ms. Lacs died, and the medical testimony, viewed most favorably to the State, was at best inconclusive on the point. The death certificate, completed by Dr. Margarita Korell who performed the autopsy, estimated Ms. Lacs's time of death as

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[10] In affirming Wiggins's conviction and sentence on direct appeal, the Maryland Court of Appeals relied upon the presumption, stating that "[u]nder the circumstances disclosed in the evidence, Wiggins's possession of the victim's property shortly after she was robbed and murdered support an inference that he was the perpetrator of both the robbery and the murder." *Wiggins v. State,* 324 Md. 551, 558, 597 A.2d at 1368-69 (Md.1991). The question of the constitutional sufficiency of the evidence aside, it seems to me to be a clear violation of due process of law for an appellate court, in affirming a conviction, to rely upon an inference that is only permissible and that was expressly rejected by the finder of fact.

Friday Evening, September 16, more than twenty-four hours after Wiggins is alleged to have murdered her. Dr. Gregory Kaufmann, an expert pathologist called by Wiggins at the guilt/innocence phase of trial, testified that Ms. Lacs had been dead a maximum of eighteen hours when her body was photographed at 9:00 p.m. on Saturday, September 17. At the trial, Dr. Korell testified that "what the maximum period was" between the time of Ms. Lacs' death and the autopsy could not be stated "with any degree of medical certainty or probability."[11] In his oral opinion denying Wiggins's motion for a new trial, Judge Hinkel characterized Dr. Korell's testimony as being of "little value." (*See* Paper No. 3, Exhibit 13 at 30). He also discounted Dr. Kaufmann's testimony, finding that "there's nothing certain about medical testimony of this sort" and that "all the other evidence in this case was sufficient for me." (*Id.*, Exhibit 13 at 33-34).

B.

In short, according to his own words, Judge Hinkel relied neither upon any presumption arising from Wiggins's possession of recently stolen property nor upon any medical

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[11] Prior to the trial, Dr. Korell had told Ms. Nethercott, one of Wiggins's attorneys, that "in her judgment the victim could not have been dead more than twenty-four hours from the time of the discovery of the body." Since the body was discovered at approximately 3:50 on the afternoon of Saturday, September 17, this was entirely inconsistent with the State's theory that Wiggins had murdered Ms. Lacs between 5:00 p.m. and 7:45 p.m. on Thursday, September 16. Shortly after this conversation, Dr. Korell called Ms. Nethercott back and retracted her opinion, saying that she had spoken with a superior and was changing her mind. Although these conversations were known to Judge Hinkel by virtue of oral argument on a pretrial motion, Wiggins's counsel did not cross-examine Dr. Korell about them at trial. The failure to do so constitutes one of Wiggins's ineffective assistance of counsel claims.

testimony in finding Wiggins guilty. What other evidence was there to support that verdict? Judge Hinkel recited only five other factual findings when rendering his oral opinion finding Wiggins guilty: (1) Wiggins was "there [in the area of Ms. Lacs's apartment] at a relevant time;" (2) he gave a false exculpatory statement to the police concerning when he came into possession of Ms. Lacs's stolen property; (3) he knew Ms. Lacs; (4) Mary Elgert, one of Ms. Lacs's friends, testified that Ms. Lacs, who was wearing a blue skirt when her body was discovered on Saturday, had also been wearing a blue skirt at a luncheon on Thursday afternoon; and (5) Ms. Lacs's apartment had been ransacked. As stated above, neither of the first of these findings establishes that Wiggins murdered Ms. Lacs. Likewise, the fact that Wiggins knew Ms. Lacs obviously does not prove that he killed her.

The fourth fact recited by Judge Hinkel proves little or nothing. Assuming that Ms. Lacs was wearing a blue skirt on Thursday, this does not prove that she was murdered between 5:00 p.m. and 7:45 p.m. that day. Her killer may have come into her apartment after 7:45, or she may have put the same skirt on Friday or Saturday before being murdered. Moreover, in finding that Ms. Lacs was wearing a blue skirt on Thursday, Judge Hinkel had to discount other testimony. Elizabeth Lane, another of Ms. Lacs's friends who had been with her at the Thursday luncheon, was the one who reported her missing. In her report she told the police that Ms. Lacs had been wearing a red dress at the luncheon. Similarly, Chianti Thomas, an eleven-year-old girl who prior to trial had selected Wiggins's photograph as the man she had observed conversing with Ms. Lacs outside her apartment at approximately 5:00 on Thursday

afternoon,[12] testified that Ms. Lacs had been wearing a red skirt at the time.

Of course, it is within the province of the fact-finder to determine what witnesses to credit and what witnesses to discredit. However, due process does not permit the fact-finder to reason backward from the conclusion that the defendant committed the crime, and to discredit or ignore every piece of evidence contrary to that hypothesis. As the Fourth Circuit has explained, "[t]o start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty." *Evans-Smith v. Taylor,* 19 F.3d 899, 910 (4th Cir. 1994). Judge Hinkel's unexplained selection of the testimony of Ms. Elgert over the testimony of Ms. Lane and Ms. Thomas on the question of the color of the dress or skirt Ms. Lacs was wearing on Thursday afternoon suggests that he fell into the trap cautioned against by the Fourth Circuit.

Judge Hinkel's discrediting of the testimony of Edith Vassar, another one of Ms. Lacs's friends, provides further evidence on the same point. Ms. Vassar, who also attended the Thursday luncheon, testified that she spoke with Ms. Lacs at 10:00 a.m. on the morning of Friday, September 16, to discuss their mutual plans for the day. This asserted conversation occurred after, under the State's theory of the case accepted by Judge Hinkel, Ms. Lacs had been murdered. Ms. Vassar stuck

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[12] Ms. Thomas, who was called as a witness for the State, was unable to identify Wiggins at the trial. Wiggins also points out that she testified that the man she observed left the area after speaking with Ms. Lacs and that Judge Hinkel did not address this fact in his opinion.

to her testimony despite the fact that on the eve of trial she received a telephone call from an unidentified caller who tried to persuade her that she and Ms. Lacs spoke on Thursday, not Friday. It may be that Ms. Vassar was incorrect in her recollection. In finding that her memory was faulty, however, Judge Hinkel gave no reason other than to say that "all of the other evidence in this case is so overwhelming that it [what Ms. Vassar testified to] is not so." As I have discussed, it is only if one starts from the premise that Wiggins was guilty that the other evidence of his guilt appears overwhelming.

C.

Let me now turn to the issue of the ransacking of Ms. Lacs's apartment--the fifth factual finding Judge Hinkel alluded to in his oral opinion finding Wiggins guilty. To say that this fact proves that Wiggins was guilty begs the question. In order to reach that conclusion, one would have to find that Wiggins was the person who did the ransacking. There was, however, no evidence that he did so, other than an inference to be drawn from the fact that he possessed Ms. Lacs's stolen property--the inference that Judge Hinkel expressly stated he chose not to draw. Further, there was also evidence that Judge Hinkel did not address tending to show that Wiggins had not ransacked the apartment and, indeed, had not been involved in a struggle with Ms. Lacs. First, Wiggins's fingerprints were not found in the apartment, and unidentified fingerprints were found. Second, a Ryder baseball cap was recovered from the apartment, and no evidence was presented tying the cap to Wiggins. For example, neither Chianti Thomas nor Robert Weinberg, a contractor for whom Wiggins was working at the apartment complex where Ms. Lacs resided, testified that they had seen Wiggins wearing a baseball cap. Third, Wiggins had been painting all day on Thursday, September 15, and there was testimony from a

witness for the State that he had to wash paint off when he arrived at his girlfriend's house that evening. No paint was found in Ms. Lacs's apartment. Fourth, Mr. Weinberg, upon whose testimony the State relied to establish that Wiggins was near Ms. Lacs's apartment at approximately 5:00 p.m. in the afternoon on September 15, testified that Wiggins returned approximately twenty minutes after having been released from work to say that he had moved some sheetrock. Weinberg further testified that Wiggins in fact had moved the sheetrock and that although this would have taken him only a few minutes, it was an approximately five minutes' walk each way from Weinberg's office to the place near Ms. Lacs's apartment where the sheetrock was located. This time sequence would not realistically have given Wiggins time to struggle with Ms. Lacs, run water in her bathtub and murder her, and ransack her apartment. Moreover, Weinberg did not testify that Wiggins was in any unusual emotion state when he returned to the office, as would have been likely if he had just committed a murder.

Ineffective Assistance of Counsel at Sentencing (Claim N)

The other claim I find meritorious is that Wiggins's trial counsel was ineffective during the sentencing proceeding in failing to develop a mitigation case. The Maryland courts' decisions that counsel was not ineffective involved an unreasonable application of clearly established federal law. Indeed, it is almost directly contrary to the Supreme Court's recent decision in *Williams v. Taylor,* 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). There, the Court held that a defendant has "a right--indeed, a constitutionally protected right--to provide the jury with . . . mitigating evidence" and that defense counsel's failure to present such evidence fell short of prevailing professional standards. *Id.* at 393-96, 120 S. Ct.

1495. The Court also found that under the facts of the case the "prejudice" prong of the test established by *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) was met.[13] 529 U.S. at 396-98, 120 S. Ct. 1495. Wiggins's mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams.* Therefore, it follows *a fortiori* that Wiggins was prejudiced by his counsels' unprofessional errors.

The State seeks to justify trial counsels' decision as a tactical one. That contention, which was accepted by the Maryland courts, is based upon the testimony of trial counsel during the post-conviction hearing that they made the decision to "retry guilt" before the sentencing jury and that they did not want to dilute the effectiveness of their argument by presenting a mitigation case as well. (*See* Paper No. 3, Exhibit 35 at 27, 54-56). In fact, it appears that defense counsels' "tactical decision" was forced upon them by inattention and lack of

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[13] The well-established standard for proving an ineffective assistance of counsel claim requires petitioner to show that "counsel's representation fell below an objective standard of reasonableness" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington,* 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). With regard to the first prong of this test, this Court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690, 104 S. Ct. 2052. All circumstances are to be considered, and this Court's scrutiny of counsel's conduct must be "highly deferential." *Id.* at 688-89, 104 S. Ct. 2052. Furthermore, even if counsel committed a professionally unreasonable error, relief can be granted only if "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993).

preparation. Before the trial, lead counsel had taken a new full-time job in another county, spent only "a day a week or so" attending to his former responsibilities, and left it to his co-counsel to do "most of the work." (*Id.*, Exhibit 35 at 12-16, 40, 100). *See, e.g., Rose v. State,* 675 So. 2d 567, 572 (Fla. 1996) (finding a failure to investigate where, *inter alia,* counsel had been pressed for time because he had gotten married and gone on a ten-day honeymoon during the period prior to sentencing). Here, the attorney left in charge had previously worked on only one or two felony jury trials, had never before worked on a capital trial, and was "frankly overwhelmed" as the trial date approached. (*See* Paper No. 3, Exhibit 35 at 81-84, 100). Each of the defense attorneys testified that the other was responsible for preparing the mitigation case.[14] (*Id.*, Exhibit 35 at 27, 40, 112-113). *See Bean v. Calderon,* 163 F.3d 1073, 1079 (9th Cir. 1998) (where failure to develop mitigating evidence resulted from counsel's "role confusion," that failure "can only be characterized as a deficiency in trial preparation, not a strategic decision"); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir. 1989) (holding that failure to investigate was due to "neglect" where "[e]ach lawyer testified that he believed that the other was responsible for preparing the penalty phase . . . ").

In any event, in order for a tactical decision to be reasonable, it must be based upon information the attorney has made after conducting a reasonable investigation. *See, e.g., Stouffer v. Reynolds,* 168 F.3d 1155, 1167 (10th Cir. 1999) ("In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed") (citations omitted); *Jackson v. Herring,* 42 F.3d 1350, 1367-68 (11th Cir. 1995) (decision to forego a mitigation presentation cannot be reasonable if it is

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[14] Neither the state post-conviction court nor the Maryland Court of Appeals addressed the "role confusion" issue in their opinions.

supported by insufficient investigation). Wiggins's trial counsel conducted no such investigation. It is true that when making their decision solely to "retry guilt," counsel were aware of some mitigating information about Wiggins's unfortunate upbringing. (*See* Paper No. 3, Exhibit 35 at 33-34). However, their very possession of that information triggered their obligation to conduct a more complete investigation.[15] *See, e.g., Lockett v. Anderson,* 230 F.3d 695, 712-14 (5th Cir. 2000) (finding a failure to investigate where counsel had notice of the defendant's possible psychological problems but failed to conduct further inquiry); *Hill v. Lockhart,* 28 F.3d 832, 845 (8th Cir. 1994); *cf. Williams,* 529 U.S. at 396, 120 S. Ct. 1495 (noting that counsel failed to return a phone call of an accountant who offered to testify as to the defendant's positive experience in a prison ministry program). It did not excuse them of their duty at least to make a fully informed and deliberate decision on the question of whether to present a mitigation case.

Trial counsel were aware that it was a routine practice in the Maryland Public Defender's Office to retain an expert forensic worker to prepare a social history of capital defendants and that funds were available for that purpose. (*See* Paper No. 3, Exhibit 35 at 29-30, 32-33; Exhibit 36 at 33-34). If they had

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[15] Even a cursory review of the DSS records provides information that Wiggins possessed "borderline intelligence" and in fact may have been mentally retarded. As discussed *infra,* at the time of trial, the Supreme Court had held that mental retardation was a mitigator to be considered in capital cases. *See Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) ("*Penry I*"). As noted in *Penry,* 492 U.S. at 334, 109 S. Ct. 2934, Maryland on July 1, 1989 became the second state to statutorily mandate that the mentally retarded not be subjected to capital punishment in some circumstances *Penry* was decided--and Maryland's statute took effect--prior to Wiggins's trial.

caused such a history to be prepared, they would have learned information that was far more extensive and detailed than the information they possessed when they made their tactical decision not to present a mitigation case.[16] Post-conviction counsel did have a social history prepared and, as a result, learned many crucial facts, including the following:

. As an infant, Wiggins and his siblings were routinely left alone and unfed for days at a time. (*See* Social History of Kevin Eugene Wiggins, Ex. Mem. Supp. Pt. for Habeas Corpus at 2-4).

. As a toddler, Wiggins witnessed one of his sisters routinely being sexually abused by an adult male friend of his mother. *Id.* at 6-7.

. At age 6, Wiggins was intentionally burned by his own mother on a hot stove as punishment for playing with matches. *Id.* at 5-6.

. Wiggins was physically abused by his first foster family and, from the age of 8 on, was sexually abused for many years by his second foster father. *Id.* at 9-12.

. Wiggins was raped by the teenaged sons of his fourth foster family. *Id.* at 20-21.

. At age 16, Wiggins was molested by his Job Corp

[16] In its opinion, the Maryland Court of Appeals made the erroneous assumption that much of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel.

Supervisor. *Id.* at 22- 23.

Clearly, this information "might well have influenced the jury's appraisal of . . . [Wiggins's] moral culpability." *Williams*, 529 U.S. at 398, 120 S. Ct. 1495. Thus, particularly since Wiggins had no prior criminal record, a tactical decision made by trial counsel in possession of this information not to present a mitigation case would have been virtually inexplicable.[17] In any event, Wiggins's trial counsel were under a duty to obtain the information necessary to make a reasoned decision and their failure to do so deprived him of effective assistance of counsel.

Involuntary Waiver of Right to Trial by Jury (Claim A)

The Sixth Amendment protection that provides that the accused may elect the right to trial by an impartial jury[18] is made applicable to the states by the Fourteenth Amendment. *See Duncan v. Louisiana*, 391 U.S. 145, 154-55, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968). In arguing that he invalidly waived his Sixth Amendment right, Wiggins also invokes the Fifth Amendment, contending that his waiver of a jury trial at

[17] The absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation of evidence about Wiggins's background would have been detrimental to him in terms of "future dangerousness," (*see* Paper No. 3, Exhibit 35 at 58, 127- 28), one of the factors the jury was called upon to consider during the sentencing proceeding. Moreover, it would appear that mitigating information would Wiggins's vulnerability and limited intelligence would not have been strategically inconsistent with "retrying guilt" during the sentencing phase. Indeed, it would seem that skillful counsel would have been able to mesh these facts into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder. *See* footnote 9, *supra*.

[18] *See also* U.S. Constitution Art. III, § 2 (trial of all crimes except impeachment shall be by jury).

the guilt/innocence stage of the proceedings was not knowing and voluntary because, at the time such election was required to be made, counsel had not arranged for an expert witness to be present at trial. Wiggins claims that the expert witness, who would testify concerning the victim's time of death, could not be present at the time set for trial, thus prompting counsel to pressure him to forego his right to proceed before a jury of his peers. (*See* Paper No. 1 at 11). Respondents contend that with one exception, Wiggins is procedurally defaulted from presenting all aspects of the waiver issue for federal habeas corpus review. (*See* Paper No. 3 at 42-43). They further contend that the undefaulted portion of his claim is without merit. (*Id.* at 46-47).

The issue of invalid waiver of the right to trial by jury first surfaced on post conviction. In that petition, Wiggins complained that (a) his waiver of a jury trial was coerced; and (b) counsel rendered ineffective assistance by pressuring him to waive trial by jury. (*See* Paper No. 3, Exhibit 30 at 10-11 and 17 and Exhibit 33 at 12-13 and 18). The post conviction court found, based on the record and testimony, that "coercion" did not occur: instead, Wiggins had

> ". . . listened to his trial counsel and their analysis of the situation of whether to take a judge or jury trial. Race, the heinous nature of the crime, and in the words of [Wiggins], his belief prejudice may have had an effect at the guilt/innocence phase, all played a part in making the decision to be tried by a judge. It was a decision made on the practicalities of the situation at the time."

(*Id.*, Exhibit 40 at 34). The post conviction court also found that "[m]any factors were involved in that decision, one of which was the possibility that an expert witness might not be

available at trial to give testimony on the all important topic of time of death." (*Id.*). Noting that Wiggins stated his reasons for electing to waive a jury at the guilt/innocence phase,[19] the post conviction court found no evidence that coercion by counsel led to Wiggins's decision to forego trial by jury at the first stage of trial. The post conviction court also found, based on testimony by trial counsel, that while the forensic pathologist enlisted by the defense might not have been available on certain dates, the pathologist would have been available to testify, and in fact did testify at trial. (*Id.*, Exhibit 35 at 24). The post conviction court accordingly rejected both aspects of Wiggins's involuntary waiver claim. (*Id.*, Exhibit 40 at 28-35 and 48-74).

On appeal from the denial of post conviction relief, Wiggins abandoned his "coercion" claim. Although it is not clear from the parties' appellate briefs, the Maryland Court of Appeals found that petitioner did preserve an "offshoot" of the waiver claim, by contending that the choice to forego trial by jury, even if voluntarily made, was forced on him through the incompetence of counsel. (*Id.*, Exhibit 50, *Wiggins v. State*, 352 Md. at 606, 724 A.2d 1). As noted by the Court of Appeals,

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[19] The record of August 1, 1989 reveals the following colloquy:
[Wiggins]: My decision is to go with a judge because I have the death penalty over my head, and I feel as though the people that agree to the death penalty are more likely to go with the State, and I feel as though, you know, that's a prejudice in that area.
[The Court]: I understand then that you are giving up your right to a jury trial.
[Wiggins]: Yes, sir.
[The Court]: For this phase of the proceeding?
[Wiggins]: Yes, I am.
(*Id.*, Exhibit 3 at 15). It is apparent that Wiggins made this choice after considering various factors presented to him by trial counsel. (*Id.*, Exhibit 35 at 47-51).

the allegation

> . . . seems to rest on this statement from [Wiggins's post conviction] expert, Mr. Fisher:
>
> > "If indeed what was the reason for waiving was simply this whole problem with getting their experts available and being able to go forward, that I think falls below the standards of adequate professional conduct. . . .But they had alternatives to that. They could have sought a continuance; they could have done a number of things that would have taken the dilemma which had been created and set it aside. But they didn't do that. So if that was the motivating factor or the primary motivating factor in their decision to go judge versus jury then I think that that falls below the standards of competent assistance of counsel."

It does not appear that Mr. Fisher, or anyone else, has faulted counsel for the decision of Dr. Breitenecker not to testify, or for their decision to retain Dr. Kauffman, who gave very favorable testimony for appellant. As Fisher did not specify what other "number of things" counsel could have done, it seems that his criticism lies in their failure to seek a postponement of trial rather than recommend that appellant proceed with a court trial. As [the post conviction court] noted, however, appellant made clear, when questioned about his choice to proceed non-jury, that it was not based on the availability of Dr. Kauffman or anyone else, but rather on his concern that a jury might be "more likely to go with the State." Other than post-conviction after-thought, there is nothing in the record to support the claim that counsel were deficient in their selection of experts or to require a conclusion that they improperly induced appellant into waiving a jury trial.

(*Id.*, Exhibit 50, 352 Md. at 605-607, 724 A.2d 1).

Given this record, it appears that Wiggins has defaulted on that portion of his jury waiver claim alleging coercion, and that in any event, coercion was not employed to induce his waiver. The remaining aspect of the jury waiver claim--that trial counsel acted unprofessionally and rendered ineffective assistance by recommending waiver rather than seek a postponement due to the unavailability of an expert witness--was found by the post conviction court and the Maryland Court of Appeals to be without merit, based on the record and on controlling legal precedent.

An ineffective assistance of counsel claim is a mixed question of law and fact. *Strickland,* 466 U.S. at 698, 104 S. Ct. 2052. Under the amendment to 28 U.S.C. Section 2254(d), this Court cannot grant relief on this ground as long as the state court denied the ineffective assistance of counsel claim based upon a reasonable application of the *Strickland* standard to the facts presented during the state court proceedings. As set forth above, after careful review of the record, it appears that the post conviction court and the appellate court that reviewed the post conviction decision reasonably applied the facts of the case to the *Strickland* standard in reviewing the ineffective assistance of counsel aspect of petitioner's jury waiver claim. The decisions reached by those courts do not reflect an unreasonable application of clearly established federal law, nor are they based on an unreasonable determination of the facts in light of evidence presented in those State court proceedings. Accordingly, petitioner is not entitled to relief on his claim of improper waiver of his right to trial by jury, pursuant to 28 U.S.C. § 2254(d).

Trial Court Error in Denying Motion for New Trial
(Claim C)

Wiggins asserts that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the trial court denied his motion for a new trial on the basis of the state medical examiner's change in testimony during sentencing proceedings. (*See* Paper No. 1 at 16). Assuming, without deciding, that the denial of a new trial impinges upon a fundamental right,[20] I find meritorious respondents' contention that this claim is procedurally defaulted and thus barred from federal habeas review.[21] Inasmuch as Judge Hinkel did not rely upon the medical examiner's testimony in reaching his conclusions (*see* Paper No. 3, Exhibit 13 at 30, 33-34), it is unlikely that Wiggins was prejudiced as a result of Judge Hinkel's failure to grant a new trial. Relief will not be granted on this claim.

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[20] In *Herrera v. Collins*, 506 U.S. 390, 414, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993), the Supreme Court acknowledged that the Constitution does not itself contain mention of the right to a new trial. The Court then noted that even if the denial of a new trial can be said to implicate the Constitution, such would seemingly occur only where it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 407-08, 113 S. Ct. 853, *quoting Medina v. California*, 505 U.S. 437, 445-46, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992), *quoting in turn Patterson v. New York*. 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).

[21] On direct appeal, Wiggins relied on Maryland Rule 4-331 to support his argument that the trial court erred in failing to grant him a new trial. *See* Paper No. 3, Exhibit 15 at 34-38. He first invoked his constitutional bases to support his argument on post conviction (*Id.*, Exhibit 30 at 14-16). The post conviction court declined to consider the constitutional aspects of the new trial claim because the claim had been raised generally on appeal. *Id.*, Exhibit 40 at 38-41. Wiggins did not challenge this ruling when appealing denial of post conviction relief. *Id.*, Exhibit 44-46 and 50.

Prosecutor's Failure to Disclose Exculpatory Evidence
(Claim D)

Wiggins next contends that the State failed to disclose exculpatory evidence in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. (*See* Paper No. 1 at 17-18). To support his claim, Wiggins points to the fact that identical charges against Geraldine Armstrong (arrested with Wiggins in Mrs. Lacs's car several days after the murder) were dropped, and Armstrong testified against him at trial. From this fact, he proffers, based "on information and belief," that one of Armstrong's brothers lived in an apartment directly beneath the victim at the time of the murder, and that another of Armstrong's brothers visited with his brother at the brother's apartment the evening of the murder. He then asks this Court to accept additional proffers, again based "on information and belief," that Geraldine Armstrong received favorable treatment from the state in exchange for her testimony against him at trial; that the role of Armstrong's brothers in the murder was not investigated or pursued by the State as a result of Armstrong's agreement to testify; that the State did not disclose to petitioner prior to trial that Armstrong had been given such favorable treatment; and that the State did not disclose the possibility that Armstrong or her brothers might be responsible for the murder. (*See* Petition at 18). As found by the post conviction court[22] and noted in this Court's March 9, 2001 Memorandum and Order, Wiggins has been unable to provide factual support for any of these suppositions. Accordingly, the state court findings must be upheld, pursuant to 2254(d).

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[22] *See* Paper No. 3, Exhibit 40 at 40 at 42-44 and 256-57; *see also* Exhibit 35 at 72-77; Exhibit 36 at 28-129; Exhibit 37 at 20; Exhibit 39 at 5-10.

Ineffective Assistance of Counsel at Trial (Claim E)

Wiggins alleges that counsel was ineffective at the guilt/innocence stage of trial, based on counsel's failure to (1) introduce evidence that Medical Examiner Korell changed her opinion respecting the victim's time of death; and (2) ensure that as of the time Wiggins had to elect whether to be tried by a judge or a jury, a defense expert would be available to testify concerning time of death. (*See* Paper No. 1 at 19-21).

As previously noted, in order to prevail on a Sixth Amendment claim of ineffective assistance, Wiggins must show that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the results of the trial would have been different. *Strickland,* 466 U.S. at 688, 694, 104 S. Ct. 2052. The Court of Appeals found

> . . . neither a Constitutional deficiency nor Constitutional prejudice in counsel's failure to cross-examine Dr. Korell (at trial or at the sentencing proceeding) or in the decision not to have Ms. Nethercott testify with regard to her conversation with Dr. Korell. Taking the second matter first, there is absolutely nothing in this record suggesting any need for Ms. Nethercott to have testified. There is no indication whatever that, had Dr. Korell been asked about the two conversations with Ms. Nethercott, or about her conversation with Dr. Dixon, she would have denied either the fact or the content of those conversations. Ms. Nethercott's concern in that regard has utterly no foundation and should never have been a factor in deciding whether to question Dr. Korell about the matter.
>
> The question of whether Dr. Korell should have been cross-examined about her initial view and her change of opinion

> must be examined in context. Several considerations are relevant. Viewing the matter at the time of trial, it is clear that Judge Hinkel was fully aware of what had occurred. Without contradiction by the prosecutor, Mr. Schlaich had informed the judge at the hearing on the pre-trial motion to dismiss or narrow the indictment of the various conversations with Dr. Korell, and Ms. Nethercott reminded Judge Hinkel of that situation in her opening statement at trial. When Dr. Korell testified at trial, she gave a range of from 24 to 48 hours, but said that it was all guesswork and that a time of death could not be pinpointed. In Ms. Nethercott's uncontradicted view, Dr. Korell was not an effective witness; she did not make a good presentation.
>
> More significant, perhaps, is the fact that Dr. Korell's trial testimony, giving a guesswork range of 24 to 48 hours, still put the earliest time of death at 9:00 Thursday evening--at least two hours after appellant was in possession of the victim's car, credit cards, and ring. Although that testimony was neither as firm nor as favorable to appellant as Dr. Korell's initial view, it still was more exculpatory than inculpatory. Both at the time of trial and at the time of the sentencing proceeding (1989), the law in Maryland was that a prior inconsistent statement by a witness, other than a party, was admissible only to impeach the witness's credibility, and not as substantive evidence. [Citations omitted]. Not until *Nance v. State,* 331 Md. 549, 629 A.2d 633 (1993) was that rule relaxed to permit an inconsistent statement to be admitted as substantive evidence if the statement was reduced to writing and either signed or otherwise adopted by the witness. Thus, Dr. Korell's initial view, expressed orally to Ms. Nethercott, that Ms. Lacs had died no earlier than late afternoon on Friday could not have been used as substantive evidence as to time of death but only to impeach the

credibility of her testimony that (1) death could have occurred 24 hours earlier, but (2) there was no sure way to tell. To have attempted to impeach that testimony by cross-examining her about her initial view would have permitted Dr. Korell to describe her conversation with Dr. Dixon, to have acknowledged that she was wrong in her initial view, and to have explained why she was wrong. It would have placed before Judge Hinkel no information of which he was not already aware, but may have allowed Dr. Korell to strengthen her resolve about the 48 hours, which would have created an even more dramatic conflict with Dr. Kauffman's opinion.

In announcing his verdict and in denying the motion for new trial, Judge Hinkel said that he placed no weight on the medical testimony as to time of death.[1] We cannot imagine what additional benefit, as a practical matter, would have accrued to appellant from further impeachment of Dr. Korell. Failure to press the point already known to Judge Hinkel does

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[1] Appellant contends that, had evidence of Dr. Korell's initial opinion been before Judge Hinkel, he might not have disregarded Dr. Kauffman's view that death occurred on Saturday, September 17. To a large extent, that assumes that Dr. Korell's initial opinion could have been used as substantive evidence for the proposition that it is possible to determine more precisely a time of death, which, as noted, is not the case. Moreover, it is clear from his remarks that Judge Hinkel was not relying on the more abstract question of whether it was possible to establish a time of death; he left in evidence that Dr. Korell could not, herself, testify, within a reasonable degree of medical certainty, the earliest time of death and simply did not credit Dr. Kauffman's opinion that death occurred on Saturday, September 17. Discrediting Dr. Korell's testimony regarding her inability to determine more precisely a time of death would not have enhanced the credibility of Dr. Kauffman's opinion.

not, in our view, overcome the presumption of sound trial strategy; nor can we conclude that, as a result of the omission, "the result of the proceeding was fundamentally unfair or unreliable."

(*See* Paper No. 3, Exhibit 50; 352 Md. at 603-05, 724 A.2d at 12- 14). I agree with the appellate court's determination that counsel's performance was not unconstitutionally deficient with regard to the cross-examination of the medical examiner, and that prejudice did not result, since in any event, Judge Hinkel did not rely upon either expert's testimony concerning time of death in rendering his decision as to Wiggins's guilt. Neither prong of *Strickland* has been satisfied, and thus the appellate court's findings must be upheld as a reasonable application of law and fact.

The issue concerning whether a defense expert was available to testify concerning time of death has been fully examined in Claim A above, and will not be reexamined here.

Use of Unreliable Identification Evidence at Trial
(Claim F)

Petitioner next claims that twelve-year-old Chianti Thomas's pretrial identification of him was violative of Fifth, Sixth, Eighth and Fourteen Amendments, because it was obtained through the use of impermissibly suggestive police procedures that created a substantial risk of erroneous identification. (*See* Paper No. 1 at 22).

The Due Process Clause protects suspects against identification procedures which are impermissibly suggestive and conducive to irreparably mistaken identifications. *See Manson v. Brathwaite,* 432 U.S. 98, 113, 97 S. Ct. 2243, 53 L.

Ed. 2d 140 (1977); *Neil v. Biggers,* 409 U.S. 188, 199, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *Stovall v. Denno,* 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). To succeed on a due process claim, petitioner must first prove that the identification procedure was impermissibly suggestive. If impermissible suggestiveness is shown, the court must then analyze whether the identification nevertheless was reliable under the totality of the circumstances. *Manson,* 432 U.S. at 114-117, 97 S. Ct. 2243; *United States v. Dorta,* 783 F.2d 1179, 1183 (4th Cir.) (identification reliable even if pretrial photo display impermissibly suggestive where witness had several previous encounters with suspect). This standard is used whether the identification is based on a "show up" or, as here, based on photographs. *See Simmons v. United States,* 390 U.S. 377, 384, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); *Harker v. Maryland,* 800 F.2d 437, 444 (4th Cir. 1986).

Although the subject of a pretrial motion, Chianti Thomas's allegedly tainted pretrial identification of Wiggins was not raised on direct appeal. (*See* Paper No. 3, Exhibits 15, 16 and 26). The post conviction court held that the claim was waived, but nonetheless reviewed it on the merits, finding no due process violation under state case law.[23] (*Id.,* Exhibit 40 at 44-48). Petitioner then abandoned his claim, failing to raise it in his appellate attack on the post conviction court's decision. (*Id.* Exhibits 44-46 and 50). This failure to present the pretrial identification claim to the Court of Appeals when challenging the denial of post conviction relief precludes this Court from further consideration of the claim, based upon the procedural

[23] *See Sallie v. State,* 24 Md. App. 468, 473, 332 A.2d 316 (1975); *Smith and Samuels v. State,* 6 Md. App. 59, 250 A.2d 285, 289 (1969). The reasoning set forth in the state cases appears to parallel that later set forth by the Supreme Court in *Manson.*

default doctrine discussed above.

Impropriety in Selecting the Grand Jury and Sentencing Jury
(Claim G)

Wiggins asserts that at sentencing he was denied his right to trial by an impartial jury of his peers. He claims that the grand jury that indicted him and the petit jury that sentenced him were selected in a manner that violated the Fourteenth Amendment's Equal Protection Clause, thereby depriving him of a jury representing a fair cross-section of the community due to the systematic exclusion of racial minorities and other distinct groups of persons. (*See* Paper No. 1 at 22). Respondents argue that this claim is procedurally defaulted and otherwise without merit. (*See* Paper No. 3 at 67- 69).

Under state law, Wiggins was entitled to a jury at his capital sentencing proceedings.[24] Prior to jury selection, Wiggins through counsel challenged the array of prospective jurors, noting that of the 104 venire persons, only three were African American.[25] (*See* Paper No. 3, Exhibit 8 at 11-12) Counsel did not present any evidence to support his contention that the percentage was due to systematic exclusion of African Americans from the panel, and the challenge to the array was denied. (*Id.*). No claim concerning the composition of the array was presented on direct appeal.

On post conviction, Wiggins argued that the manner in

[24] *See* Md. Code Ann., Art. 27, § 413(b) (1996 Repl. Vol.); *Bruce v. State,* 328 Md. 594, 599, 616 A.2d 392, 395 (1992).

[25] According to counsel, at the time Wiggins was tried, the percentage of African Americans in Baltimore County was roughly 13% of the population. *Id,* Exhibit 8 at 11-12.

which Baltimore County selects grand jurors and petit jurors--to wit, through the use of voter registration lists--was improper. He further contended that trial counsel was ineffective in failing to develop evidence to support a challenge to the array of jurors. (*Id.*, Exhibit 30 at 17-19 and 35-36 and Exhibit 33 at 22-23). The post conviction court heard evidence concerning the process for juror selection in Baltimore County and trial counsel's allegedly deficient performance with regard to the jury challenge, and rejected both claims. (*Id.*, Exhibit 40 at 102-137). In appealing that decision, Wiggins abandoned his claim that the County's jury selection process systematically excluded African Americans, and pursued only the ineffective assistance portion of the jury composition claim. (*Id.*, Exhibit 44 at 46-48 and Exhibit 50, 352 Md. at 607-08, 724 A.2d at 15). Wiggins has defaulted on the portion of the juror array issue presented here. He has failed to show cause for the default, and prejudice cannot be inferred, inasmuch as the use of voter registration lists for selection of juror pools passes constitutional muster. *See Truesdale v. Moore,* 142 F.3d 749, 755-56 (4th Cir.), *cert. denied,* 525 U.S. 951, 119 S. Ct. 380, 142 L. Ed. 2d 314 (1998).

Inadequate Voir Dire of Prospective Jurors (Claim H)

Similarly, Wiggins has defaulted on his claim that he was denied his right to adequate voir dire in order to delve into the racial attitudes of prospective jurors, as well as ascertain the prospect of bias resulting from their status as prior victims of crime; their possible bias in favor of law enforcement personnel; and their ability to evaluate and respond to mitigating evidence. (*See* Paper No. 1 at 24). Wiggins's contention of inadequate voir dire of prospective jurors was not raised on direct appeal, but instead was presented unsuccessfully at post conviction. (*See* Paper No. 3, Exhibit 30 at 20-24 and Exhibit 40 at 137-66). Wiggins did not seek to

appeal the post conviction court's determination of the voir dire issues. (*Id.*, Exhibits 44, 46 and 50). Neither cause for abandoning these issues, nor prejudice resulting therefrom, has been demonstrated, and accordingly review of the process by which prospective jurors were screened is barred under the procedural default doctrine.

Trial Court Error in Excusing Prospective Jurors
(Claim I)

Wiggins's next claim concerns prospective jurors whose excusal he claims violated his Constitutional rights. Again citing the Fifth, Sixth, Eighth and Fourteenth Amendments, Wiggins contends that these jurors should not have been excused, because they "did not sufficiently express during voir dire that their personal feelings against the death penalty were sufficiently strong to prevent them from following the law and performing their duty" if chosen for the jury. (*See* Paper No. 1 at 25). As noted by respondents, this claim also is barred from consideration under the procedural default doctrine.

Wiggins did not present this claim on direct appeal. The post conviction court denied relief (*see* Paper No. 3, Exhibit 40 at 166-78), and petitioner did not pursue the claim on appeal from that decision. (*Id.*, Exhibits 44-46 and 50). Petitioner has not shown cause and prejudice sufficient to overcome his default with regard to this issue.

Insufficiency of the Evidence by which the Sentencing Jury Found an Aggravating Factor (Claim J) and
Insufficiency of the Evidence by which the Sentencing Jury Found First Degree Principalship (Claim K)

Based on my previous finding that the evidence was

constitutionally insufficient to sustain Wiggins's conviction, these claims have been rendered moot and need not be decided here.

Erroneous Evidentiary Rulings at the Sentencing Phase
(Claim L)

Wiggins next asserts that the trial court improperly excluded relevant mitigating evidence, and admitted other evidence that was irrelevant and highly prejudicial. He claims that evidence that the prosecution had offered him a plea bargain in which he would have received a life sentence; evidence that other defendants convicted of murder under similar circumstances had not received the death penalty, and that the death penalty would be disproportionate as applied to him; and evidence showing that the death penalty is not imposed with any frequency in Maryland in like circumstances was improperly excluded. He further contends that other evidence was improperly admitted, including the testimony of a police officer with regard to *TV Guide* magazines found in the victim's apartment and testimony of the victim's friend who commented on the victim's personality. (*See* Paper No. 1 at 28). Respondents' argument to the contrary, it appears that Wiggins properly presented these evidentiary claims in the state courts, thus requiring this Court to examine each of the claims here.

Wiggins first contends that the evidence of the State's offer of a plea in exchange for a life sentence should have been presented to the jury as mitigating evidence, and was erroneously excluded by the trial court. The Maryland Court of Appeals examined this claim and found that:

> [p]rior to sentencing, the State moved *in limine* to exclude

> evidence of its offer of a life sentence in exchange for a guilty plea. Wiggins had indicated an intention to introduce evidence of this offer during the sentencing hearing. The court ruled that while the offer, if admitted in evidence, would "mitigate [] in favor of the defendant," it was not admissible before the sentencing authority as it would seriously cripple the plea negotiation process in capital sentencing prosecutions.
>
> Wiggins argues that the State's plea offer was properly admissible as mitigating evidence because, under *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the sentencing authority in capital cases must be permitted to consider any relevant mitigating factor, i.e., anything that might serve as a basis for a sentence less than death. Specifically, Wiggins says that the State's offer, for whatever reason it was made, demonstrated its belief that a life sentence was appropriate in the case and had this been known to the sentencing jury it would not have imposed the death sentence.
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> In *Lockett*, 438 U.S. at 605, 98 S. Ct. 2954...the Supreme Court held that
>
> > "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."
>
> (Emphasis in original: footnotes omitted.) Nothing in *Lockett*, the Court said, "limits the traditional authority of the court to exclude, as irrelevant, evidence not bearing on the

defendant's character, prior record, or the circumstances of his offense". *Id.* at 605, n.12, 98 S. Ct. 2954 . . . quoted in *Johnson, supra.*, 303 Md. at 527-28, 495 A.2d 1.

We have said that the appropriateness of sentences other than death may be considered by the sentencer as a mitigating circumstance in a capital prosecution. *See Hunt v. State,* 321 Md. 387, 404, 583 A.2d 218 (1990); *Doering v. State,* 313 Md. 384, 545 A.2d 1281 (1988); *Harris v. State,* 312 Md. 225, 539 A.2d 637 (1988). In *Hunt,* the defendant did not seek timely admission of evidence of his sentence for a handgun offense, and his request to reopen his case to offer it was denied by the trial judge. We held that the evidence would have been admissible in Hunt's case-in-chief, as evidence that "would aid the jury in assessing the legal and practical effect of a sentence less than death," 321 Md. at 404, 583 A.2d 218, but that the trial judge did not abuse his discretion in denying the request to reopen. In *Harris,* we held that evidence of the sentences imposed on the defendant for a related robbery offense, where the robbery was the statutory aggravating factor in a capital sentencing proceeding, was admissible. We reasoned that the sentencer might consider, as a mitigating factor, the fact that the defendant had already been appropriately sentenced for that crime. In *Doering,* we held that a defendant in a capital sentencing proceeding may introduce relevant and competent information regarding his eligibility for parole in the event a life sentence is imposed. We explained that the sentencer, in seeking to determine the appropriateness of a life sentence, would be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence may be considered as a relevant mitigating circumstance. *Doering,* 313 Md. at 412, 545 A.2d 1281. In these three cases, the factors with the

potential to mitigate were related to the actual amount of time the defendant was likely to spend in prison in the event the jury elected to impose a life sentence; consequently, they constituted relevant information for the jury to consider in determining the appropriate disposition.

Evidence of a plea offer, on the other hand, is not an appropriate factor to aid the jury in making its determination. As Wiggins concedes, the State may have sought a guilty plea to avoid the possibility of an acquittal in a case which involved largely circumstantial evidence. This prosecutorial concern would not, therefore, necessarily indicate that the State considered a life sentence to be the appropriate punishment for Wiggins's crimes. In other words, as the State suggests, its plea offer did not reflect on either the crime or the character of the defendant; rather, it resulted after the State evaluated the strength of its case and the concern that it had that the jury might not return a guilty verdict. Thus, the evidence of the plea offer did not bear on the defendant's character, prior record, or the circumstances of the crime, and was not relevant mitigating evidence. *See Calhoun v. State,* 297 Md. 563, 468 A.2d 45 (1983).

(*See* Paper No. 3, Exhibit 26; 324 Md. at 572-74, 597 A.2d at 1369-70).

A sentencer in a capital case must be permitted to consider any relevant mitigating factor. *See Eddings v. Oklahoma,* 455 U.S. 104, 112, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982). However, the factor must not only be "mitigating" in general, but also must be "relevant" in particular. *See Blystone v. Pennsylvania,* 494 U.S. 299, 307, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990) ("[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant

mitigating evidence"). To be relevant, evidence must pertain to an "aspect of a defendant's character or record [or] any of the circumstances of the offense." *See Franklin v. Lynaugh,* 487 U.S. 164, 174, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (plurality), *quoting Eddings v. Oklahoma,* 455 U.S. at 110, 102 S. Ct. 869. The Supreme Court has construed "circumstances of the crime" narrowly. *Franklin,* 487 U.S. at 174, 108 S. Ct. 2320 ("residual doubt" as to defendant's guilt held not to be a "circumstance of the offense"); *Blystone,* 494 U.S. at 306-06, 110 S. Ct. 1078 (defendant not entitled to an instruction permitting the supposed insubstantiality of the State's aggravating circumstances to be considered as a mitigating circumstance). Where, as here, the motivating factor behind the plea offer may have been a desire to avoid the possibility of acquittal due to the circumstantial nature of the evidence--rather than the State's belief that the circumstances of the offense were undeserving of the ultimate punishment-- Wiggins cannot offer evidence of the plea offer in order to generate a "residual doubt" at sentencing as to the correctness of his conviction, or to have the jury speculate as to the possible motivations for the State's offer.[26]

With regard to Wiggins's claim that other mitigating evidence was wrongfully excluded at sentencing, the Maryland Court of Appeals found as follows:

> Wiggins next contends that the trial court erred in excluding from the consideration of the sentencing jury, as relevant mitigating evidence, a three- volume collection of documents detailing potentially capital cases where a sentence less than

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[26] Respondents note by way of analogy that under Rule 408 of the Federal Rules of Evidence, a plea offer or similar compromise proposal is irrelevant and inadmissible in the proceeding to which the offer pertained.

death was imposed. He draws attention to Art. 27, § 414(e)(4), which requires this Court in every case where the death sentence has been imposed to compare it to those imposed "in similar cases" to ensure that it is not excessive or disproportionate, "considering both the crime and the defendant." Wiggins claims that sentence proportionality is an appropriate consideration for the sentencing authority as well, and that the proffered evidence should have been admitted for its consideration. He claims that, lacking this information, the sentencing jury did not have relevant information to make its sentencing decision--information which, he says, is traditionally relevant in determining the appropriate sentence and which would have assisted a jury in determining the weight to be given to aggravating factors in weighing them against mitigating circumstances. In this regard, Wiggins says that had the jury known of the frequency with which life imprisonment is imposed in murder cases of a more extreme nature than his own, it might well have determined to return a sentence less than death.

In *White v. State,* 322 Md. 738, 589 A.2d 969 (1991), we noted that proportionality review in capital sentencing cases under Art. 27, § 414(e)(4) requires the review to be conducted by this Court and not by the sentencing authority. We further noted that there is no federal constitutional requirement of proportionality review in death penalty cases, citing *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). While we recognized that evidence proffered by a defendant to establish the existence of a mitigating circumstance should be generously viewed by the sentencer, we also said that mitigating circumstances are "defendant specific" and "incident specific" and that ordinarily the findings regarding another person do not in any way tend to establish a material fact beneficial to an entirely

different individual. *White, supra,* 322 Md. at 750, 589 A.2d 969; *Johnson v. State, supra,* 303 Md. at 528-29, 495 A.2d 1. For like reasons, we also find no merit in Wiggins's further argument that the trial court erred in excluding from evidence a law review article chronicling a study which, according to the author, uncovered 350 cases in which a miscarriage of justice occurred in a potentially capital case.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 574-76, 597 A.2d at 1370-71).

I agree with this finding that this documentary evidence was relevant only with regard to the appellate court's statutorily-mandated proportionality review, and was considered in accordance with State law. (*Id.,* Exhibit 26; 324 Md. at 580-82, 597 A.2d at 1373-74). It does not constitute mitigating evidence as contemplated by *Lockett v. Ohio* and other cases cited above, in large part because it consisted of information from other cases involving other defendants, and did not reflect on any aspect of Wiggins's character, record, or circumstances of the offense. *Franklin v. Lynaugh,* 487 U.S. at 174, 108 S. Ct. 2320; *Eddings v. Oklahoma,* 455 U.S. at 110, 102 S. Ct. 869. As such, it was properly excluded from consideration by the jury. In any event, as correctly noted by Maryland's highest appellate court, there is no constitutional requirement that a defendant receive proportionality review, even on appeal. *See Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

With regard to Wiggins's claim that evidence was improperly admitted at sentencing, the Maryland Court of Appeals found as follows:

Wiggins next claims that the trial judge, during the

sentencing hearing, committed reversible error when he admitted evidence relating to a *T.V. Guide* book found in the victim's apartment at the time her body was discovered. Specifically, he claims that testimony by a police officer describing a *T.V. Guide* magazine with markings on all of the pages through the date that the victim was last seen alive, but not thereafter. . . . was irrelevant and prejudicial. He argues that it had no probative value, because no witness testified regarding the victim's habit of marking T.V. Guide magazines. Therefore, he says, it is not known when these marks were made, why they were made, or even by whom they were made.

In *State v. Joynes,* 314 Md. 113, 119, 549 A.2d 380 (1988), we applied the test which governs the admissibility of evidence in a criminal case. We noted that there are two important components of relevant evidence; materiality and probative value. Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove. Evidence which is not probative of the proposition at which it is directed is irrelevant. *Id.* at 119, 549 A.2d 380. Thus, to be of probative value, evidence must only have a tendency to prove the fact at issue; it need not establish the fact conclusively or be beyond doubt.

A daily pattern of marking each day's television programs was reflected in the magazine, and it ceased as of the time the victim was last seen alive. While it is theoretically possible that someone other than the victim made the marks, or that they were made randomly, or were all made on one day, these possibilities do not circumscribe the relevance and admissibility of the evidence. The victim lived alone, and the

factfinder could infer that the markings were made on a day-to-day basis, in a contemporaneous fashion, consistent with the victim's daily television viewing selections. We think that the date on which the markings ceased had a tendency to prove that the victim died on September 15 and, therefore, the evidence was properly admitted.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 578-79, 597 A.2d at 1372-73).

Wiggins's contention to the contrary, the admission of the *TV Guide* does not implicate the Due Process Clause of the Fourteenth Amendment. Because the court's ruling involves only a matter of state evidentiary law, it is not a ground for relief here. *See generally Estelle v. McGuire,* 502 U.S. 62, 67-70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (rejecting claim that admission of evidence violated the Fourteenth Amendment's due process guarantee).

Wiggins's next contention concerning the impact of "victim impact evidence" is equally unpersuasive. As noted by the Maryland Court of Appeals:

> Wiggins further complains that testimony by one of the victim's friends, Mary Elgert, constituted victim impact evidence which was inadmissible under *Booth v. Maryland,* 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). Specifically, Ms. Elgert testified that the victim was "a very happy-go-lucky person" who was "always thinking of something interesting."
>
> We think it clear that Ms. Elgert's testimony could in no event be deemed victim impact evidence under the Court's decision in *Booth;* it did not describe the impact of the crime

> on the victim's family, or the family members' opinion, and characterizations of the crime and the defendants. *See Mills v. State,* 310 Md. 33, 72-73, n. 14, 527 A.2d 3 (1987), *rev'd on other grounds,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). The even more compelling answer to Wiggins's contention is that in *Payne v. Tennessee,* 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), the Supreme Court reversed its earlier holding in *Booth,* concluding that the Eighth Amendment does not prohibit a jury from considering, at a capital sentencing hearing, "victim impact" evidence relating to a victim's personal characteristics, and the emotional impact of the murder on the victim's family. Accordingly, there was no error in admitting Ms. Elgert's testimony in evidence.

(*See* Paper No. 3, Exhibit 26; 324 Md. at 579-80, 597 A.2d at 1373).

The state appellate court's finding is a reasonable application of Supreme Court precedent and will not be overturned here.

Error in Instructing the Jury (Claim M)

Wiggins also contends that he was denied his Fifth, Sixth, Eighth and Fourteenth Amendment rights due to the trial court's failure to give proper instructions to the jury. Specifically, he argues that the trial court failed to properly instruct the jury with regard to (1) the nature and function of mitigating circumstances; and (2) the principle of lingering doubt. He further contends that the trial court (3) failed to list nonstatutory mitigating circumstances individually; (4) improperly instructed the jury on the issue of reasonable doubt; (5) failed to require the State to prove that aggravating

circumstances outweighed mitigating circumstances beyond a reasonable doubt; and (6) failed to require that mitigating circumstances be proven by a preponderance of the evidence before they could be considered in the sentencing judgment. (*See* Paper No. 1 at 29).

Respondents correctly contend that contentions (1) through (4) are procedurally defaulted, because they were raised on post conviction review but not thereafter preserved on appeal.[27] (*See* Paper No. 3, Exhibits 44-46 and 50). Relief is unavailing on the two nondefaulted aspects of this claim (contentions (5) and (6)).

Maryland's death penalty statute requires a defendant to prove mitigating evidence by a preponderance of the evidence.[28] Furthermore, if the jury finds that one or more mitigating circumstance exists, the statute requires the jury to determine whether, by a preponderance of the evidence, the aggravating circumstances outweigh the mitigating circumstances.[29] The jury's reliance on these provisions in Wiggins's case were declared constitutional by Maryland's highest appellate court. (*See* Paper No. 3, Exhibit 26; 324 Md. at 582-83, 597 A.2d at 1374).

Existing Supreme Court precedent supports the constitutionality of the Maryland statute. In *Walton v. Arizona,* 497 U.S. 639, 649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (plurality), Arizona's capital sentencing statute was challenged because it imposed on defendants the burden of establishing, by

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[27] Neither cause nor prejudice sufficient to overcome procedural default can be found in the record or pleadings.

[28] *See* Md. Code Ann., Art. 27, § 413(g).

[29] *Id.*, § 413(h).

a preponderance of the evidence, mitigating circumstances sufficiently substantial to call for leniency. Four members of the Supreme Court concluded that such a burden did not violate a defendant's constitutional rights. *Id.* at 650, 110 S. Ct. 3047. These justices also concluded that the Court's decision in *Mills v. Maryland,* 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988) "did not suggest that it would be forbidden to require" each . . . juror, before weighing a claimed mitigating circumstance in the balance, to be convinced in his or her own mind that the mitigating circumstance has been proved by a preponderance of the evidence. *Id,* 497 U.S. at 651, 110 S. Ct. 3047. This same plurality indicated that nothing in *Mills* "hinted that there was any constitutional objection to that aspect of the instructions" requiring that mitigating circumstances be proved by a preponderance of the evidence. *Id.*[30] *See also Thomas-Bey v. Smith,* 869 F. Supp. 1214, 1222-24 (D. Md. 1994) (rejecting, on basis of principle of non-retroactivity of *Teague v. Lane,*[31] claim that Maryland's capital sentencing statute is unconstitutional because aggravating circumstances need outweigh mitigating circumstances by only a preponderance of the evidence). The Maryland Court of Appeals' decision regarding the issue of allocating to the defendant the burden to prove mitigating circumstances is not an unreasonable application of Supreme Court precedent and must be upheld under 28 U.S.C. § 2254(d).[32]

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[30] Justice Scalia found no Eighth Amendment violation on other grounds. *Id.* at 656-74, 110 S. Ct. 3047.

[31] 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989).

[32] Indeed, the Supreme Court held, in *Buchanan v. Angelone,* 522 U.S. 269, 279, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998), that the absence of instructions on the concept of mitigation and on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments.

The defendant in *Walton* also attacked Arizona's capital sentencing statute because it provided for the imposition of the death penalty if one or more aggravating circumstance was found and mitigating circumstances were insufficient to call for leniency. *Id.* at 651, 110 S. Ct. 3047. The plurality in *Walton,* relying on *Boyde v. California,* 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), found constitutional a jury instruction stating that if jurors concluded that the aggravating circumstances outweigh the mitigating circumstances, the death penalty must be imposed.[33] The Court also examined its holding in *Blystone,*[34] wherein the Court had held that the presence of aggravating circumstances serves the purpose of limiting the class of death eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury. *Id.,* 494 U.S. at 306-07, 110 S. Ct. 1078; *Walton,* 497 U.S. at 651-62, 110 S. Ct. 3047. The finding of the Maryland Court of Appeals is supported by Supreme Court precedent, which finds no constitutional prohibition against instruction that a sentence of death is appropriate where a capital sentencer finds that aggravating circumstances outweigh the mitigating circumstances.

Imposition of Capital Punishment on a Mentally Retarded Individual (Claim O)

Wiggins next contends that it is unconstitutional to impose capital punishment on a mentally retarded individual. Respondents argue that the record does not demonstrate that

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[33] *Id.,* 497 U.S. at 652, 110 S. Ct. 3047; *see also Boyde,* 494 U.S. at 374, 110 S. Ct. 1190.

[34] *Blystone v. Pennsylvania,* 494 U.S. 299, 110 S. Ct. 1078, 108 L. Ed. 2d 255 (1990).

Wiggins is mentally retarded and, in any event, the contention as presented is barred by the procedural default doctrine.

It appears that the issue of imposition of capital punishment on the mentally retarded was fully explored--in the context of ineffective assistance of trial counsel at sentencing--at the post conviction hearing. *See* Paper No. 3; Exhibit 35 at 33-35. The issue was also raised on post conviction in pre-hearing memoranda, both in the context of ineffective assistance of counsel (*id.,* Exhibit 30 at 35 and Exhibit 32 at 13-19) and in the context of an Eighth Amendment violation. (*Id.,* Exhibit 30 at 31). These aspects of the issue were presented in Wiggins's application for leave to appeal the denial of post conviction relief. (*Id.,* Exhibit 41 at 14-20 and 21-22 (ineffective assistance claim) and at 59 (Eighth Amendment claim)). I find that both aspects of the issue are fully exhausted; are not subject to the procedural default doctrine; and must be examined on the merits here.

Counsel's failure to raise the issue of mental retardation in mitigation at sentencing is but one piece of the "ineffective assistance of counsel" puzzle more fully explored above.[35] Relief has been granted generally on the ground of ineffective assistance of counsel at sentencing, and need not be explored anew here.

On June 26, 1989 (subsequent to Ms. Lacs's murder, but prior to Wiggins's trial), a divided Supreme Court remanded a capital case involving a mentally retarded individual

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[35] Respondents correctly note that the record does not exhaustively document the extent of Wiggins's mental limitations. The social services records do not fully reveal the extent of his mental retardation, nor the testing and other criteria used to support any such conclusions.

condemned to death by a Texas jury. As noted above, while the Court declined to hold that the execution of mentally retarded people convicted of capital offenses was categorically prohibited by the Eighth Amendment, a majority of the Court found that mental retardation "may well lessen a defendant's culpability for a capital offense. . . ." and that sentencers must be able to "consider and give effect to mitigating evidence of mental retardation in imposing sentence," so that "an individualized determination whether 'death is the appropriate punishment' can be made in each particular case." *See Penry v. Lynaugh,* 492 U.S. 302 at 335, 340, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (*Penry I*).

Four days later, an amendment to Md. Code. Ann., Art. 27, § 412 took effect.[36] The purpose of the amendment was to afford protection to individuals charged with capital crimes who possessed "significantly subaverage intellectual functioning as evidenced by an intelligence quotient of 70 or below ...and impairment in adaptive behavior," where such "mental retardation is manifested before the individual attains the age of 22." *See* Art. 27, § 412(f)(3). The maximum penalty for first degree murder committed by a mentally retarded defendant under the statute no longer was death, but rather life imprisonment or, upon proper notice, life imprisonment without the possibility of parole. *Id.,* §§ 412(g)(1) and (2).

The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. Since its enactment in 1789, those prohibitions have expanded, in conjunction with the "evolving standards of decency that mark

[36] The *Penry* Court noted the Maryland amendment in its opinion. At that time, only Georgia and Maryland had codified prohibitions against the execution of the mentally retarded.

the progress of a maturing society." *See Ford v. Wainwright,* 477 U.S. 399, 406, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986); *Trop v. Dulles,* 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958). While the Supreme Court has not held that execution of the mentally retarded violates our "evolving standards of decency,"[37] it has required the presentation of such information in mitigation at the sentencing phase of capital trials. Clearly, the information contained in the DSS records indicated that Wiggins might be mentally retarded. If full investigation revealed mental retardation, counsel, under the case law existing at that time, was required to (1) argue that the statute barred imposition of the death penalty against Wiggins, and (2) if unsuccessful there, argue Wiggins's mental retardation as a mitigating factor to be considered by the sentencing jury. The fact that counsel at sentencing failed to investigate this possibility is but another element demonstrating that Wiggins received ineffective assistance of counsel at the sentencing phase.

Arbitrary Application of the Death Penalty (Claim P)

Wiggins also argues that the death penalty as applied across the various Maryland jurisdictions is arbitrarily and disproportionately applied, and that it was unfairly applied to him despite the State's weak case involving circumstantial evidence; his lack of prior criminal record; and his low IQ. Respondents urge this Court to find Wiggins's "proportionality" claim procedurally defaulted or, alternatively, to find the claim is not cognizable under 28 U.S.C. § 2254(a).

[37] Whether it may do so in the near future, in light of comments made by several of the justices, remains to be seen. *Certiorari* is pending in a capital case involving a mentally retarded defendant. *See Skipper v. Lee,* 238 F.3d 414, 2000 WL 1853330 (4th Cir. 2000).

In *Furman v. Georgia,*[38] the Supreme Court concluded that the death penalty was imposed in such a discriminatory,[39] wanton, freakish[40] and infrequent manner,[41] that any death sentence imposed by a State constituted cruel and unusual punishment. Since that time, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. The Supreme Court has examined "the gravity of [an] offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions," and at times has struck down punishments as inherently disproportionate--and therefore cruel and unusual--when imposed for a particular crime or category of crime.[42] *Pulley v. Harris,* 465 U.S. 37, 42-43, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

In response to *Furman,* many states revised their capital sentencing statutes,[43] while others merely revised their capital sentencing procedures. Such revisions by and large attempted to limit jury discretion and avoid arbitrary and inconsistent

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[38] 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972).

[39] 408 U.S. at 240, 92 S. Ct. 2726.

[40] *Id.* at 306, 92 S. Ct. 2726.

[41] *Id.* at 310, 92 S. Ct. 2726.

[42] *See, e.g., Solem v. Helm,* 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (striking down sentence of life without parole for fourth conviction for relatively minor felonies); *Enmund v. Florida,* 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982) (striking down capital sentence for defendant who aided and abetted but did not commit murder during course of robbery); *Coker v. Georgia,* 433 U.S. 584, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977) (striking down capital sentence for rape of adult).

[43] Those revisions generally focused on mandatory appellate review of capital sentences; limitations placed on the number of crimes for which capital sentencing could be imposed; and the requirement that aggravating circumstances be present and mitigating circumstances be considered.

results. Many states, including Maryland, devised schemes that required courts reviewing capital sentences determine whether, considering both the crime and the defendant, such sentences were disproportionate to sentences imposed in similar cases.[44] Although these proportionality safeguards were created by the states in response to *Furman,* the Supreme Court itself has never imposed a *requirement* upon the states to conduct proportionality review in capital cases.[45]

Wiggins's claim was reviewed on direct appeal, as provided by statute.[46] (*See* Paper No. 3, Exhibit 26 at 13; 324 Md. 551, 580-82, 597 A.2d 1359). Inasmuch as Wiggins's conviction and sentence are set aside pursuant to this Memorandum, I need not consider his proportionality claim here.

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[44] Maryland is among the states imposing this requirement pursuant to statute. In other states that have adopted such review, the appellate court examines proportionality despite the absence of a statutory requirement. In other states, no such review is undertaken, either by practice or by statute. *See Pulley,* 465 U.S. at 44, 104 S. Ct. 871.

[45] *See, e.g., Jurek v. Texas,* 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976) (death sentence upheld even though state case law and statutory schemes did not provide for proportionality review); *Zant v. Stephens,* 462 U.S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983), *cited in Pulley,* 465 U.S. at 48-51, 104 S. Ct. 871. Indeed, the Court has held that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant,* 462 U.S. at 885, 103 S. Ct. 2733, *quoting Lockett v. Ohio,* 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion).

[46] Proportionality review in capital cases is required pursuant to Md. Code Ann., Art. 27, § 414(e)(4). Because the claim was clearly raised before the Maryland Court of Appeals on direct appeal, the procedural default doctrine does not bar its consideration here

The Death Penalty is Excessive (Claim Q)

Invoking the Fifth, Sixth, Eighth and Fourteenth Amendments, Wiggins argues that "the sentence of death is in all cases excessive punishment." (*See* Paper No. 1 at 36; *see also* Paper No. 4 at 57). I note that this claim has been procedurally defaulted,[47] and in any event does not represent the law as set forth by current Supreme Court precedent.[48]

Ineffective Assistance of Appellate Counsel (Claim R)

As a final argument, Wiggins complains that he received ineffective assistance of appellate counsel, because counsel failed to argue on appeal certain claims raised herein, to wit: (Claim H) inadequate voir dire of jurors; (Claim I) wrongful excusal of prospective jurors; (Claim L) improper evidentiary rulings by the sentencing court; (Claim M) improper instruction of the jury; (Claim O) imposition of capital punishment on a retarded individual; (Claim P) arbitrary application of the death penalty in Maryland; and (Claim Q) the death penalty is excessive punishment under all circumstances.

Respondents properly contend that appellate counsel's failure to raise Claims H, I, L, M, P and Q requires a finding that these claims are procedurally defaulted. Although Wiggins

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[47] Wiggins did not present this claim on direct appeal. *See* Paper No. 3, Exhibits 15, 16 and 26. Although raised at post conviction at the Circuit Court level, *id.*, Exhibit 30 at 31 and Exhibit 38 at 45- 47, the claim was not preserved when Wiggins sought leave to appeal the denial of post conviction relief. *Id.*, Exhibits 44-46 and 50.

[48] Since 1976, the Supreme Court has upheld imposition of the death penalty by the various states under certain circumstances. *See Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plurality) and its progeny.

argued at post conviction that these claims should have been raised on direct appeal, he abandoned such argument when seeking leave to appeal the denial of post conviction relief. (*See* Paper No. 3, Exhibits 44 and 46). None of these claims presents a basis for relief, and petitioner cannot argue that he was prejudiced by appellate counsel's failure to articulate same on direct appeal.

As to Claim O, the trial record does not appear to contain adequate support for appellate counsel to have concluded that Wiggins was mentally retarded. Indeed, trial counsel failed to adequately explore the issue of Wiggins's mental development and present such information as mitigation at sentencing. Therefore, it is reasonable to conclude that appellate counsel employed appropriate strategy by not raising the issue on appeal, thus reserving the claim more appropriately for development at post conviction proceedings.

Accordingly, the instant petition for habeas corpus relief will be denied in part and granted in part, as set forth in the accompanying Order.

Date: September 18, 2001

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

Appendix D

United States District Court
District of Maryland

Kevin WIGGINS
v.
Thomas R. CORCORAN, Warden William Sondervan, Commissioner of Corrections J.
Joseph Curran, Jr., Attorney General, State of Maryland

No. JFM-99-2420.

Sept. 18, 2001.

ORDER

In accordance with the foregoing Opinion, IT IS this 18th day of September, 2001 by this Court hereby ORDERED:

1. That the above-captioned petition for habeas corpus relief, filed pursuant to 28 U.S.C. Section 2254 (Paper No. 1) IS GRANTED as to petitioner's claims of insufficiency of the evidence and ineffective assistance of counsel with regard to the failure to present mitigating evidence during sentencing;

2. That petitioner's claims are OTHERWISE DENIED;

3. That the conviction and sentence of Kevin Wiggins ARE VACATED;

4. That petitioner shall be RELEASED within THIRTY (30) DAYS unless within that time respondents advise this court that they intend to appeal this decision, in which event

counsel shall contact the court to discuss the issue of the appropriate forum to consider the question of petitioner's release pending appeal;

4. That the Clerk of Court CLOSE this case; and

5. That the Clerk of Court MAIL a copy of this Order, together with the foregoing Memorandum, to petitioner; to petitioner's counsel, Donald Verrilli; and to Assistant Attorney General Ann N. Bosse.

Date: September 18, 2001

/s/ J. Frederick Motz
J. Frederick Motz
United States District Judge

Appendix E

Court of Appeals of Maryland.

Kevin WIGGINS
v.
STATE of Maryland.

No. 121, Sept. Term, 1997.

Feb. 10, 1999.

Stuart M. Rennert (Donald B. Verrilli, Jr., Gregory P. Magarian, Elena N. Broder, Heidi D. Kitrosser, Jenner & Block, on brief), Washington, DC, for Appellant.

Ann N. Bosse, Asst. Atty. Gen. (J. Joseph Curran, Jr., Atty. Gen., on brief), Baltimore, for Appellee.

Argued before BELL, C.J., and ELDRIDGE, RODOWSKY, CHASANOW, RAKER, WILNER and CATHELL, JJ.

WILNER, Judge.

In 1989, appellant was convicted by Judge J. William Hinkel, sitting in the Circuit Court for Baltimore County, of the robbery and first degree murder of Florence Lacs and two counts of theft. A jury summoned to determine the appropriate punishment for the murder found that appellant should be put to death, and, upon that verdict, Judge Hinkel imposed a sentence of death. We affirmed that judgment in *Wiggins v. State,* 324 Md. 551, 597 A.2d 1359 (1991), *cert. denied,* 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992), rejecting appellant's claims that the evidence was legally insufficient to

establish that he was the murderer and that the trial court erred in denying his motion for new trial.

In January, 1993, appellant filed a petition for relief under the Post Conviction Procedure Act (Maryland Code, Article 27, § 645A), ultimately raising 38 claims embodying 52 issues, among which were that he was denied the effective assistance of counsel at both his trial and his sentencing proceeding. After an extensive evidentiary hearing, the hearing judge, John F. Fader, II, announced from the bench his tentative conclusion that counsel had been deficient in at least two respects--failing at trial and at sentencing to elicit evidence from the assistant medical examiner regarding her initial determination as to the approximate time of Ms. Lac's death, and failing at the sentencing proceeding to present certain mitigating evidence--but he reserved judgment as to whether those deficiencies were sufficiently prejudicial to warrant post-conviction relief. Judge Fader indicated that a written opinion would be filed within 60 days. In October, 1997--three-and-a-half years later--he filed a 257-page opinion finding no Constitutional deficiencies at either the trial or the sentencing proceeding and therefore denying relief.

We granted appellant's application for leave to appeal that determination. Five issues are presented in the appeal, which we have reordered as follows:

(1) Whether trial counsel provided Constitutionally ineffective assistance at trial and sentencing by failing to "bring to light" evidence of a prior inconsistent opinion on the part of the State's medical expert regarding time of death;

(2) Whether trial counsel provided Constitutionally

ineffective assistance (A) at trial by failing timely to obtain a forensic expert, thereby requiring appellant to choose between a jury trial without an expert and a court trial with one; and (B) at sentencing by failing to investigate, offer evidence of, or object to jury selection procedures in Baltimore County;

(3) Whether trial counsel provided Constitutionally ineffective assistance at the sentencing proceeding by failing to investigate and offer mitigation evidence concerning appellant's traumatic background and mental problems;

(4) Whether appellant was denied Constitutional rights when the State failed to disclose an agreement to treat his girlfriend, Geraldine Armstrong, leniently; and

(5) Whether the evidence was legally sufficient to support (A) his conviction of murder in the first degree; or (B) the jury's finding that he was a principal in the first degree in the murder of Ms. Lacs.

For the reasons stated in this Opinion, we shall affirm the denial of post- conviction relief.

BACKGROUND

The 77-year old victim, Florence Lacs, resided in the Clark Manor Apartments, in Woodlawn. When she failed to attend a scheduled social event on Saturday, September 17, 1988, a friend reported her missing. At the request of the police, the apartment manager entered Ms. Lacs's apartment to investigate and found her dead in the bathtub. She was lying on her side, half covered by cloudy water. It appeared that a household

cleaner and a bug spray had been poured or sprayed on her. She was wearing a white blouse and a blue skirt, but had on no underwear. The skirt had been raised to her waist. The apartment had been ransacked. Paramedics, who arrived shortly thereafter, formally pronounced Ms. Lacs dead at about 3:50 in the afternoon. The deputy medical examiner, Dr. Stanley Felsenberg, arrived around 9:00 p.m., and, while there, had the body removed from the tub, examined it, and caused it to be sent to the medical examiner's office, where, near midnight, it was tagged and refrigerated. Dr. Margarita Korell, an assistant medical examiner, performed an autopsy at 9:00 the next morning, September 18, 1988. There is evidence that the death certificate completed by Dr. Korell estimated the time of death as Friday evening, September 16, 1988.[1] Dr. Korell listed the cause of death as drowning and the manner of death as homicide.

Appellant was a painter who had been working with a construction crew in the victim's apartment building on Wednesday, September 14, and Thursday, September 15. At some point on Thursday, Ms. Lacs asked him to move a truck

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[1] The death certificate was identified by Dr. Korell and admitted as Defendant's Exhibit 4 at the sentencing proceeding. There is no indication in the record that it was offered or admitted at the trial before Judge Hinkel. We are unable to locate the certificate in the record now before us. In his dissent in the direct appeal, Judge Eldridge stated that "[t]he Death Certificate, as originally filled out by the State's expert, fixed the approximate time of death as Friday evening," (*Wiggins*, 324 Md. at 585, 597 A.2d at 1375) and that is consistent with testimony in the record. The record in this appeal, which consists of documents presented at the trial, the sentencing hearing, and the post- conviction hearing, is quite large and not well-indexed. A number of documents and papers appear to be missing. As there seems to be no dispute that the original certificate listed the approximate time of death as noted, the fact that the document cannot be located is not important.

that was blocking her car. Ms. Lacs attended a social event with some of her friends that afternoon but had returned to her apartment by 5:00 p.m. She was seen conversing with appellant in the hallway just outside her apartment between 5:00 and 5:50. Chianti Thomas, a twelve-year-old child visiting a friend at the next-door apartment, testified that Ms. Lacs's assistance was sought in locking the door to the friend's apartment, that appellant appeared from the basement and volunteered his assistance, and that she heard Ms. Lacs and appellant briefly converse about "watching" some sheetrock. That was the last time Ms. Lacs was seen alive.

On Thursday evening, around 7:45 p.m., appellant arrived at the home of his girlfriend, Geraldine Armstrong, driving the victim's car. He and Ms. Armstrong went shopping, using the victim's credit cards, which appellant told Ms. Armstrong belonged to his aunt. They repeated that activity the next day (Friday, September 16) as well. On Saturday, they pawned a ring that belonged to Ms. Lacs. Appellant and Armstrong were arrested on September 21, while driving Ms. Lacs's car. Upon his arrest, appellant claimed that he had found the car, with the keys, credit cards, and ring in it, on Friday, on a restaurant parking lot. That, of course, was inconsistent with the otherwise undisputed fact that he was in possession of the car and the credit cards on Thursday evening.

Principally on this evidence, the State charged appellant with first degree murder, robbery, and theft, and sought the death penalty. Appellant, represented by Carl Schlaich and Michelle Nethercott, waived a jury trial and elected to be tried before Judge Hinkel. After a four-day trial, Judge Hinkel found appellant guilty of robbery, first degree felony murder, and theft. Appellant then elected to have his sentence on the murder conviction determined by a jury, which was summoned for that

purpose. After a six-day hearing, the jury found that appellant was a principal in the first degree, that the murder was committed in the course of robbing the victim (an aggravating factor), that appellant had not previously been convicted of a crime of violence (a mitigating factor), that the aggravating factor outweighed any mitigating factors, and that the sentence should be death.[2] While automatic review of that judgment was pending in this Court, appellant moved for a new trial, which Judge Hinkel denied. As noted, we affirmed the judgments, and the United States Supreme Court denied appellant's petition for *certiorari*.

DISCUSSION

Time of Death

The evidence of appellant's guilt, at least of murder, was almost entirely circumstantial, there being neither eyewitness testimony nor physical evidence directly connecting appellant to the murder itself or to the interior of Ms. Lacs's apartment. The State's theory was that appellant had entered Ms. Lacs's apartment between 5:00 and 5:30 on Thursday afternoon, robbed her, and, in the commission of the robbery, forced her into the bathtub and drowned her. Her death may have been facilitated by her significant cardiovascular disease, which was listed on the death certificate as a contributing factor.

The State's case rested essentially on seven facts or circumstances: (1) the fact that Ms. Lacs was seen by friends as late as 4:15 p.m. on Thursday, September 15, in her car, wearing a blue skirt and a white blouse; (2) when found dead on Saturday in the bathtub, she was wearing a blue skirt and a

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[2] One or more, but fewer than 12, jurors also listed as a mitigating factor "His background."

white blouse;[3] (3) the fact that her weekly TV Guide had programs marked through September 15, with no markings for the 16th or beyond; (4) although appellant finished work at 4:45 p.m. on Thursday and had no particular reason to remain on the premises, he was seen with Ms. Lacs in the hallway outside her apartment between 5:00 and 5:30 p.m., which was the last time anyone saw her alive; (5) his explanation to his supervisor, who saw him at the apartment building some 25 minutes after appellant finished work, that he needed to move some sheetrock and the supervisor's response that (i) he had not asked appellant to move any sheetrock, (ii) moving sheetrock was not part of appellant's job, and (iii) in any event, moving the sheetrock should not have taken more than a few minutes; (6) appellant's possession and unlawful use of Ms. Lacs's automobile, credit cards, and jewelry later that evening; and (7) incriminating statements that appellant allegedly made to two fellow inmates during his pre-trial detention. Judge Hinkel, in announcing his verdict, gave no weight to the testimony of the two fellow inmates.

Apart from the overall circumstantial nature of the case as to criminal agency, four particular circumstances caused the defense to focus on medical evidence regarding the

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[3] The evidence regarding Ms. Lacs's skirt was not without contradiction. One of her friends, Elizabeth Lane, testified that Ms. Lacs was wearing a red skirt on Thursday, and different recollections of the exact color of the skirt she was found in were recorded. There was testimony that it was light blue and that it was teal or blue-green. There was evidence that it was a darker blue. *See Wiggins v. State, supra,* 324 Md. at 586, 597 A.2d at 1376 (J. Eldridge, dissenting). Judge Hinkel found, as a fact, that Ms. Lane was mistaken and that Ms. Lacs was wearing the same outfit, when found in the bathtub, that she was wearing on Thursday afternoon. Inferentially, in finding appellant to have been a principal in the first degree in Ms. Lacs's murder, the jury made the same determination.

approximate time of death: (1) Ms. Lacs was clearly still alive at 5:00 to 5:30 on Thursday, September 15; (2) by 7:45 that evening, appellant was in possession of her car and items allegedly taken from her or her apartment; (3) although appellant reported briefly for work on Friday morning, September 16, there was no direct evidence that he was in or near Ms. Lacs's apartment after 5:30 on Thursday afternoon; and (4) one of Ms. Lacs's friends, Edith Vassar, testified that Ms. Lacs telephoned her at 10:00 or 10:30 on Friday morning, September 16. In the view of the defense, unless the State could show that Ms. Lacs was or could have been killed during the approximately two-hour window between 5:30 and 7:30 p.m. on September 15, its evidence that appellant was the killer, as opposed to merely a thief, would have been much less persuasive.

The issue of time of death first came before the court in the context of a pre-trial motion to dismiss or narrow the indictment. The indictment charged that the killing occurred between September 15 and September 17, and, based on the holding of the Court of Special Appeals in *State v. Mulkey,* 73 Md. App. 501, 534 A.2d 1374 (1988), appellant claimed that the indictment was not sufficiently particular--that the State should be required to allege with greater precision when the murder occurred.[4] In arguing the motion, Mr. Schlaich

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[4] In *Mulkey,* the indictment charged the defendant with committing child abuse and sexual offenses between June 1 and September 6, 1982, June 1 and September 5, 1983, and June 1 and September 3, 1984. The Court of Special Appeals affirmed an order dismissing the indictment as not complying with particularity requirements. Shortly before the hearing on appellant's motion, we reversed the judgment of the Court of Special Appeals, holding that the trial court should have ruled on a pending demand for particulars before dismissing the indictment. We remanded the case for further proceedings, not ruling out the prospect of an ultimate dismissal. *See*

informed Judge Hinkel that Ms. Nethercott, his co-counsel, had interviewed Dr. Korell on July 18, 1989, and that Dr. Korell had said that (1) she *could* prescribe a range of time of death, but (2) the State had never asked her to do so. Probed by the court, Mr. Schlaich said that Dr. Korell had advised Ms. Nethercott that "the outside limit at that point would have been 24 hours" and more likely would be about 12 hours. Her opinion thus was that death probably occurred between 12 and 24 hours prior to discovery of the body at 3:50 p.m. on September 17. That would have been consistent with what she put on the death certificate. Mr. Schlaich said further that, as the result of a call from the Assistant State's Attorney, Dr. Korell called his office two days later and advised that she had changed her opinion as to time of death. She apparently told Ms. Nethercott that, after consulting with a "female supervisor" whom she would not name, she came to believe that death could have occurred up to 48 hours prior to discovery of the body. Mr. Schlaich noted:

> "Obviously, that's something we can attack later on at trial, but I'm pointing this out to the court because it is indicative of how key of an issue the time of death is about to become and will be in this case.
>
> The Medical Examiner now calls us herself and says, 'I've got to point out to you that I must have been wrong.' So obviously, it is getting around that this is going to be important. The reason it is going to be important is the State

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State v. Mulkey, 316 Md. 475, 560 A.2d 24 (1989). Appellant was made aware of our holding in *Mulkey* just prior to the hearing. His point was that the law still required some particularity and that he should not be put in a position of effectively having to establish an alibi for a three-day period. Whether appellant was entitled to a dismissal or narrowing of the indictment under *Mulkey* is not an issue in this appeal.

> in its own indictment and certainly in all of the evidence provided in discovery indicates that Mr. Wiggins was in possession of the victim's property on September the 15th. She is found dead on September the 17th. That's a three day span."

Mr. Schlaich continued by noting the importance of the alleged robbery, which would serve as an aggravator for purposes of the death penalty: "Obviously, if Mr. Wiggins has the property before she is dead, there's a problem with that aggravator. If Mr. Wiggins acquires the property after she is dead, then maybe that's not true."[5] If, as Dr. Korell initially believed, death occurred within 24 hours before discovery of the body, appellant would have been in possession of the stolen property before Ms. Lacs was murdered. Mr. Schlaich also noted the statement of Ms. Vassar that Ms. Lacs had called her on Friday morning, September 16. "So," he concluded, "there's a serious and obvious issue here as to time of death."

The prosecutor, in response, told the court that her information from the medical examiner's office was that they could not establish a more particular time of death, and that is why the indictment was worded as it was--that Ms. Lacs was last seen alive on September 15 and was discovered dead on September 17. Essentially on that basis, the court denied the defense motion to dismiss or particularize the indictment.

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[5] Not only would the fact that a homicide occurred during the course of a robbery elevate the homicide to first degree felony murder (Md. Code, Article 27, § 410), thereby making the perpetrator subject to the death penalty (Article 27, § 412(b)), but the fact that the murder was committed during the commission or attempted commission of a robbery constitutes an aggravating factor for purposes of imposing the death penalty (Article 27, § 413(d)(10)).

The issue next surfaced at trial. In an opening statement, Ms. Nethercott recounted that the medical examiner (Dr. Korell) had told counsel that Ms. Lacs had not been dead for 48 hours but later reevaluated that view. Dr. Korell was called to testify as a State's witness. By way of background, Dr. Korell, who apparently was raised in Argentina, had been an assistant medical examiner for about 10 years when she performed the autopsy on Ms. Lacs. Although she was not board-certified, she had performed over 3,000 autopsies and was qualified as an expert in forensic pathology in every county of Maryland, in Federal court, and in Washington, D.C., New York, Illinois, and Florida. Dr. Korell recounted her findings from the autopsy--that Ms. Lacs died of drowning and that the manner of death was homicide. When asked by the prosecutor whether she could determine how long Ms. Lacs had been dead, Dr. Korell said that it would be a guess, somewhere between 12 and 48 hours.[6] She noted that the body had been in the refrigerator all night and said that it would help if she knew the condition of the body when Dr. Felsenberg examined it on the evening of September 17.[7] With the information available, she

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[6] It is not entirely clear whether Dr. Korell was estimating from the time of the autopsy on Sunday morning or from the time the body was removed from the water on Saturday evening. At one point, she spoke in terms of when she performed the autopsy, but at another she spoke of whether the body was in the water for 12, 36, or 48 hours. Based on her testimony at the sentencing hearing, *see ante,* it appears that she was referring to when the body was removed from the water. That would have put the earliest time of death at about 9:00 Thursday evening.

[7] Dr. Felsenberg made a written report of his findings, and Dr. Korell acknowledged having read that report. It does not appear that a copy was ever admitted into evidence, however. There is in evidence, as State's Exhibit 47, a file memorandum from Mr. Schlaich dated July 24, 1989, reporting a conversation that he had with Dr. Felsenberg regarding the report. According to the memorandum, Dr. Felsenberg said that "he cannot place an outside limit on the time of death, however, he recalls that the police were clear that Ms. Lacs had been alive at 1030 on September 17 (Saturday), which would be consistent with what he saw. He also remembers that the last contact from the victim was by phone with a friend." There is no evidence in the record, and no recorded report from the police, that Ms. Lacs was alive on Saturday. Dr. Felsenberg may have been referring to Ms. Vassar's statement that she spoke with Ms. Lacs on Friday morning.

was not able to express an opinion within a reasonable degree of medical certainty "as to time of death."

Mr. Schlaich, on that ground, moved to strike Dr. Korell's testimony, but the court denied the motion, leaving her testimony as indicating that "she's unable to say with any degree of medical certainty or probability what the maximum period of time was." Mr. Schlaich then cross-examined Dr. Korell with regard to a number of her findings but did not inquire further about a time of death. He did not ask about the conversation she had with Ms. Nethercott, about her initial view that death occurred within 24 hours prior to discovery of the body, about the statement on the death certificate attesting that death occurred on Friday, September 16, about the conversation she supposedly had with her supervisor, or about the reported change in her opinion.

Appellant produced his own expert, Dr. Gregory Kauffman, to testify as to time of death. Dr. Kauffman was a forensic pathologist and a lawyer. He had served as an assistant medical examiner in Maryland, in California, and in Michigan, and had conducted some 4,000 autopsies, although, like Dr. Korell, he was not board-certified. He examined Dr. Korell's autopsy report, photographs of the body taken at the scene, the photographs taken of the body just prior to the autopsy, the paramedic's report, and Mr. Schlaich's memorandum of his conversation with Dr. Felsenberg, and he

said that he was aware of how and when the body was discovered and its condition when discovered. Based in large part upon the pictures of the body taken at the scene and at the time of autopsy, he opined, within a reasonable degree of medical certainty, that Ms. Lacs had not been dead for more than 18 hours prior to the time the body was removed from the bathtub and photographed at the apartment (or 21 hours before it was delivered to the medical examiner's office and refrigerated). That would have made the earliest time of death 3:00 a.m. on Saturday. Of importance to him was the lack of any noticeable decompositional changes, particularly in those parts of the body that had not been submerged in the bathtub. He stated that, due to the refrigeration, there would have been no significant decomposition between the time the body was refrigerated and the time the photograph was taken the next morning. Although aware of Dr. Felsenberg's statement that Ms. Lacs was last known to be alive on Saturday, Dr. Kauffman said that he gave no significance to that in determining his estimate of when she died.

In light of Dr. Kauffman's testimony, the State called in rebuttal Deputy Chief Medical Examiner Ann Dixon, but, because she had not been listed as a witness in discovery and had never rendered a report, the court sustained appellant's objection to her testifying.

In announcing his findings, Judge Hinkel began by stating the evidence that he found not to be credible. That included the testimony of appellant's fellow inmates as to the supposed incriminating statements made by appellant, appellant's written statement given to the police upon his arrest that he had found Ms. Lacs's car, with the credit cards and jewelry in it, on a parking lot on Friday, September 16, Ms. Lane's testimony that Ms. Lacs was wearing a red skirt, rather than a blue one, on

Thursday, and Ms. Vassar's testimony that Ms. Lacs called her on Friday, September 16. Ms. Lane and Ms. Vassar, he concluded, were simply mistaken. He did find, however, that appellant was at the scene on Thursday, that he knew Ms. Lacs from their earlier conversation that day, that he acquired her car and property on Thursday, and that, after work on that Thursday, he entered Ms. Lacs's apartment where he robbed and killed her. As to the time of death, Judge Hinkel stated:

> "I don't know the exact time of death. I am persuaded, however, from all of the evidence that the death of Ms. Lacs did not occur sometime between 9 p.m. on September 17th and 3:00 a.m. on 9--17, which would be the 18 hour period that was testified to by Dr. Kauffman. I am persuaded that it occurred on Thursday the 15th of September."

As noted, appellant elected to have his sentence determined by a jury, which was his right under Md. Code, Article 27, § 413(b). In order to impose the death penalty, the jury was required to find, unanimously and beyond a reasonable doubt, that appellant was a principal in the first degree to the murder of Ms. Lacs (Md. Code, Article 27, § 413(e)(1); *Baker v. State,* 332 Md. 542, 570, 632 A.2d 783, 796 (1993), *cert. denied,* 511 U.S. 1078, 114 S. Ct. 1664, 128 L. Ed. 2d 380 (1994)), and, as the jury had heard none of the evidence presented at the trial before Judge Hinkel, much of the evidence presented earlier was presented again. With respect to time of death, the State called both Dr. Korell and Dr. Dixon.

Dr. Korell informed the jury that Ms. Lacs died of drowning, with contributory arteriosclerotic cardiovascular disease, and that the manner of death was homicide. She said that she could not pinpoint a time of death--that "time of death never can be pinpointed unless somebody dies right in front of

somebody else"--but estimated, within a reasonable degree of medical certainty, that Ms. Lacs "could have died 24 to 48 hours before she was found." In part, that conclusion was based on Dr. Korell's opinion that the water in the bathtub was cold water, which would better have preserved the body. She believed that the water was cold because "[Ms. Lacs] did not look like she was scalded in any way." Her estimate was also based, in part, on the fact that rigor mortis and livor mortis were present when Dr. Felsenberg examined the body.

On cross-examination, Dr. Korell made clear that the 24 to 48 hour period she spoke of dated back from when Dr. Felsenberg arrived at 9:00 on Saturday evening (September 17), which would place the earliest estimated time of death at 9:00 on Thursday evening (September 15). She acknowledged that that estimate would be consistent with evidence that Ms. Lacs had a telephone conversation at about 10:30 on Friday morning. She clarified that, by "cold water," she meant water at about room temperature--cooler than lukewarm. Like at trial before Judge Hinkel, Dr. Korell was not asked about her initial view that death occurred within 24 hours prior to the body being found or about the conversations she allegedly had with Ms. Nethercott concerning that opinion and her change of mind.

Dr. Dixon confirmed that it was "all but impossible" to pinpoint a time of death "within the ground of reasonable medical certainty," but said that it was possible, by assessing the degree of post-mortem changes to the body along with a number of other factors, to determine a range. She identified, in particular, whether rigor mortis and post-mortem lividity have become fully developed and whether there was skin slippage--separation of the outer epidermal layers of the skin caused by the onset of decomposition. Based on her review of the autopsy report, she opined that death occurred at least 24

hours before the body was examined by Dr. Felsenberg "and it could easily have been 36 to 48 hours or even more, based on the body changes." Dr. Dixon agreed that the lack of "scalding," which she said could occur even at comfortable bath temperature, indicated to her that the bath water was "cool at most."[8] Dr. Dixon stated that she observed nō skin slippage on the photographs taken of the body. On cross-examination, Dr. Dixon admitted that she had a conversation with Dr. Korell about Korell's statement on the death certificate that death had occurred on Friday, September 16, and that she indicated to Dr. Korell that "she could extend her range back to 48 hours," because the body was found in cold water and "because of the post mortem changes which had occurred since . . . death."

In place of Dr. Kauffman, the defense produced as its expert at sentencing Dr. Comparini, deputy medical examiner for the District of Columbia. Dr. Comparini described for the jury in some detail what happens to a body after death--the onset and eventual relaxation of rigor mortis, the development and fixing of livor mortis, and other decompositional changes. Based on her review of the autopsy report, the various photographs that were taken at the crime scene and at the autopsy, and Dr. Felsenberg's observations, she opined that death would have occurred "not more than 24 to 36 hours" prior to the autopsy on Sunday morning, September 18, which would have made the earliest time around 9:00 p.m. on Friday, September 17. On cross-examination, the State brought out that Dr. Comparini was not board-certified, that she had never before testified in a death penalty case, and that she had not consulted with either the police or the Maryland medical

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[8] Given the fact that Ms. Lacs was almost fully clothed, it is certainly a fair inference that she had not gotten into the bathtub to take a bath and would not, therefore, have filled the tub with warm water.

examiners before reaching her conclusions. She found it essentially irrelevant that the body was found partially submerged in water. Dr. Comparini did indicate, however, that the changes "after 36 and 48 [hours] . . . [are] quite similar," and that the decompositional changes are gradual.

In argument to the jury, the State noted one point of agreement between the medical experts--that a precise time of death could not be determined. The prosecutor argued, in rebuttal, that "[W]e can't tell from the medical testimony alone when Ms. Lacs was murdered. . . ." She stressed the fact that, from the brief conversation they had on Thursday, when Ms. Lacs asked appellant to move the truck, appellant knew Ms. Lacs and that he knew which car was hers. She noted further that appellant was in Ms. Lacs's presence outside her apartment when she was last seen alive between 5:00 and 5:30, that he was in possession of her credit cards, jewelry, and car about two hours later, and that he lied about whose credit cards they were and how he came into possession of her car. The State asked the jury to find that he was the killer--a principal in the first degree--from those circumstances. Defense counsel paid more attention to the medical testimony, noting Dr. Korell's estimate that death could have occurred as early as 48 hours before Dr. Felsenberg's examination (or 9:00 p.m. Thursday) but reminding the jury that on the death certificate she had listed the time of death as being on Friday. Counsel also pointed out Dr. Comparini's testimony placing the earliest time of death at 9:00 Friday evening.

In deciding upon the death sentence, the jury expressly found that appellant was a principal in the first degree in Ms. Lacs's murder.

Appellant filed a motion for new trial that Mr. Schlaich

represented was based on "finding out new evidence at the sentencing phase that would have not been available to us at the guilt/innocence trial."[9] The entire thrust of the motion, taken from the argument presented in support of it, was Dr. Korell's shifting opinions as to the earliest possible time of Ms. Lacs's death. In a nutshell, defense counsel complained that (1) at the time of the autopsy, as evidenced by her death certificate, and as late as July 18, 1989, Dr. Korell believed that death occurred at the earliest on Friday afternoon or evening, September 16; (2) on July 20, after discussing the matter with her supervisor, she concluded that death could have occurred as early as 48 hours prior to September 17; (3) at trial, she opined that it was all guesswork and that she could not state a range within a reasonable degree of medical certainty; but (4) at sentencing, she was back to her July 20 view that death could have occurred as early as Thursday evening at 9:00. Coupled with that was the fact that the State had not disclosed Dr. Dixon in discovery and the contention that, had the defense known that Dr. Dixon would opine a range going back to 9:00 Thursday evening, the defense would not have objected to her testimony.

Arguing the motion, Ms. Nethercott explained that, on July 18, 1989-- about two weeks before trial commenced--she met personally with Dr. Korell, that Dr. Korell, after reviewing her file, expressed the opinion that Ms. Lacs "had died somewhere in the range of 4 to 10 hours prior to the discovery of the body at 4:00--Dr. Felsenberg examined the body at 9:00--and that her outside limit, her furthest absolute limit was 24 hours." Ms. Nethercott stated further that she had asked Dr. Korell three times whether, in light of that conclusion, the victim was not dead as of 4:00 on September 16, "and she said yes." Ms. Nethercott continued that, on July 20, Dr. Korell called and

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[9] We are unable to locate the motion in the record before us.

said that, following a conversation with her supervisor, she had changed her opinion "and was now willing to extend her range on time of death back to 48 hours from the 17th of September." On July 23, the Chief Medical Examiner, Dr. Smialek returned a call from Mr. Schlaich. Dr. Korell, who was on an extension, again confirmed "that she had changed the opinion and that she had discussed this matter, after having thought about it, and that she now had a different opinion."

Ms. Nethercott recalled that, at trial, Dr. Korell testified that she could not state a time of death within a reasonable degree of medical certainty, whereas, at the sentencing proceeding, she testified, to a reasonable degree of medical certainty, that Ms. Lacs had been dead 24 to 48 hours prior to Dr. Felsenberg's examination. That would have put the earliest time of death at 9:00 on Thursday which, Ms. Nethercott argued, was not consistent with the State's theory. Her trial testimony, according to Ms. Nethercott, created a factual issue--whether it was possible to estimate a time of death--that placed into dispute Dr. Kauffman's testimony. Had Dr. Korell testified at trial as she did at sentencing and had the defense known that Dr. Dixon would also so testify, they would not have objected to Dr. Dixon, for all three experts would then have given an earliest time of death at or later than 9:00 p.m. Thursday, which, in counsel's view, would have excluded appellant as the killer.

Judge Hinkel found no merit in that argument and denied the motion. First, he concluded that the revelation as to Dr. Korell's shifting opinions was not newly discovered evidence: counsel knew she had changed her view more than two weeks before trial. More important, he said that it would have made no difference to him, as the finder of fact, had Dr. Korell and Dr. Dixon testified at trial as they did at sentencing. That

would have placed the range of time of death back to 9:00 Thursday evening--only a few hours after appellant had the opportunity to commit the crime and within two hours after he was in possession of the victim's property. He stated that "there's so many other facts in this case and there's nothing certain about medical testimony of this sort." He concluded:

> "The State and the defense knew that, that the medical profession is not equipped or prepared to state with any degree of certainty, not even probability, it appears, as to matters of this nature. But all the other evidence in this case certainly was sufficient for me, at the guilt/innocence stage, and for the jury in the sentencing phase, to determine that Mr. Wiggins was a principal in the first degree."

These matters, as presented to the circuit court, were raised in appellant's direct appeal. As noted, he argued first that, because, in his view, his convictions rested solely on circumstantial evidence that permitted a reasonable hypothesis of innocence, they could not be sustained. Noting in particular Dr. Kauffman's testimony that Ms. Lacs likely died on September 17, appellant urged that it was possible that he broke into her apartment on the 15th and stole her credit cards and ring but did not kill her. We rejected that argument, concluding, in particular, "[t]hat the expert witnesses were either unable to agree, or differed as to the time of death, does not render clearly erroneous Judge Hinkel's ultimate finding that Wiggins robbed and murdered the victim on September 15." *Wiggins v. State, supra,* 324 Md. at 567, 597 A.2d at 1367. We also rejected his complaint about the denial of his motion for new trial, concluding (1) that, in light of Judge Hinkel's statements, both in announcing his verdict and in denying the motion for new trial, regarding the medical evidence, Dr. Korell's second revised opinion, if introduced at

trial, would not have produced a different result, and (2) that her changed testimony between trial and sentencing did not render the trial fundamentally unfair. At 324 Md. at 570, 597 A.2d at 1368, we concluded:

> "As the trial court noted, and the record indicates, medical testimony regarding time of death is fraught with uncertainty. Wiggins was aware that Dr. Korell changed her opinion once prior to the trial, and the defense had ample time to, and did, secure its own qualified expert testimony on this matter. As the ambivalence of the State's expert witness was known to the defense, her opinion at the sentencing hearing did not deprive Wiggins of a fair trial."

In January, 1993, appellant filed a petition for post-conviction relief, raising, as we said, 52 issues, several of which concerned, in one way or another, Dr. Korell's shifting views of when Ms. Lacs may have died. The only one we need be concerned with here is the argument that appellant is entitled to either a new trial or a new sentencing hearing "because his trial counsel provided ineffective assistance at the guilt phase of trial by failing to bring to light evidence of the State medical expert's prior inconsistent opinion, which dealt with the most crucial issue in [his] defense and which was consistent with the defense's theory." Specifically, he claims that counsel's failure to impeach Dr. Korell or to introduce evidence regarding her prior inconsistent statement fell below the bounds of reasonable professional conduct.

Three people testified at the post conviction hearing regarding the handling of Dr. Korell. Ms. Nethercott recounted her two conversations with Dr. Korell, testifying, in that regard, to what previously had been elicited in arguments on the motion to dismiss or narrow the indictment and the motion for

new trial. She added that the defense had previously retained Dr. Rudiger Breitenecker as an expert pathologist, that Dr. Breitenecker supported the defense theory that Ms. Lacs died after September 15, that when she was informed that Dr. Korell, whose initial opinion also supported that theory, had changed her opinion, she spoke with Dr. Breitenecker, who then advised that he was unwilling to testify. That combination--Dr. Korell's retraction and Dr. Breitenecker's unwillingness to testify--tore a major hole in the defense's case less than three weeks before trial. She finally was able to retain Dr. Kauffman to take the place of Dr. Breitenecker. She said that Dr. Korell did not give a good presentation at trial--that Dr. Korell had some difficulty with English and tended to be excitable. Ms. Nethercott discussed with Mr. Schlaich and with the District Public Defender, Mr. Saunders, whether she could or should testify regarding her conversations with Dr. Korell and whether, if she did, she would be able to continue as co-counsel. She determined, as a matter of strategy, to continue in the case, not to request a postponement, and not to testify about her conversations with Dr. Korell. Mr. Schlaich, she said (correctly), handled the cross-examination of Dr. Korell.

Mr. Schlaich had very little memory about the details concerning Dr. Korell. He recalled discussing with Ms. Nethercott whether she should testify and they decided that she should not do so. The major witness for appellant was a District of Columbia lawyer, Gerald Fisher, who had been involved at the post-conviction level and as co-counsel in a number of Maryland death penalty cases but had never tried one himself, either as to guilt/innocence or as to sentencing. He expressed the belief that Mr. Schlaich and Ms. Nethercott failed to give adequate representation in a number of respects. As to Dr. Korell, he opined that "their inability or their unwillingness to confront her with contradictory statements

which were crucial contradictory statements is ineffective without justification."

Judge Fader concluded that Mr. Schlaich and Ms. Nethercott "should have done something, as opposed to doing nothing, to have the impact of this inconsistent statement brought before the court," but found no prejudice. Apart from characterizing Mr. Fisher's proffer as to prejudice as "speculative," Judge Fader noted that the matter of Dr. Korell's inconsistent statement was brought to Judge Hinkel's attention and that he found the inconsistency irrelevant, and that it was brought to the jury's attention as well.

The standard to be applied in determining whether counsel's representation comported with the requirements of the Sixth Amendment is that enunciated in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see Lockhart v. Fretwell,* 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Oken v. State,* 343 Md. 256, 283, 681 A.2d 30, 43 (1996), *cert. denied,* 519 U.S. 1079, 117 S. Ct. 742, 136 L. Ed. 2d 681 (1997). To prove a claim of Constitutionally ineffective assistance of counsel, appellant must establish "that counsel's performance was deficient and that the deficient performance prejudiced the defense." *Oken, supra,* at 283, 681 A.2d at 43. To show a deficiency, appellant must (1) demonstrate that counsel's acts or omissions, given the circumstances, "fell below an objective standard of reasonableness considering prevailing professional norms," *id.,* and (2) overcome the presumption that the challenged conduct "be considered sound trial strategy." *Id.* To show that a deficiency prejudiced the defense, appellant must establish that counsel's error was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable," *id.* at 284, 681 A.2d at 43, quoting from *Lockhart v. Fretwell, supra,* 506 U.S. 364, 369,

113 S. Ct. 838, 842, 122 L. Ed. 2d 180, 189, quoting, in turn, from *Strickland, supra.*

Applying those standards, we find neither a Constitutional deficiency nor Constitutional prejudice in counsel's failure to cross-examine Dr. Korell (at trial or at the sentencing proceeding) or in the decision not to have Ms. Nethercott testify with regard to her conversation with Dr. Korell. Taking the second matter first, there is absolutely nothing in this record suggesting any need for Ms. Nethercott to have testified. There is no indication whatever that, had Dr. Korell been asked about the two conversations with Ms. Nethercott, or about her conversation with Dr. Dixon, she would have denied either the fact or the content of those conversations. Ms. Nethercott's concern in that regard has utterly no foundation and should never have been a factor in deciding whether to question Dr. Korell about the matter.

The question of whether Dr. Korell should have been cross-examined about her initial view and her change of opinion must be examined in context. Several considerations are relevant. Viewing the matter at the time of trial, it is clear that Judge Hinkel was fully aware of what had occurred. Without contradiction by the prosecutor, Mr. Schlaich had informed the judge at the hearing on the pre-trial motion to dismiss or narrow the indictment of the various conversations with Dr. Korell, and Ms. Nethercott reminded Judge Hinkel of that situation in her opening statement at trial. When Dr. Korell testified at trial, she gave a range of from 24 to 48 hours, but said that it was all guesswork and that a time of death could not be pinpointed. In Ms. Nethercott's uncontradicted view, Dr. Korell was not an effective witness; she did not make a good presentation.

More significant, perhaps, is the fact that Dr. Korell's trial testimony, giving a guesswork range of 24 to 48 hours, still put the earliest time of death at 9:00 Thursday evening--at least two hours *after* appellant was in possession of the victim's car, credit cards, and ring. Although that testimony was neither as firm nor as favorable to appellant as Dr. Korell's initial view, it still was more *exculpatory* than *inculpatory.* Both at the time of trial and at the time of the sentencing proceeding (1989), the law in Maryland was that a prior inconsistent statement by a witness, other than a party, was admissible only to impeach the witness's credibility, and not as substantive evidence. *See Ali v. State,* 314 Md. 295, 305, 550 A.2d 925, 930 (1988); *Sun Cab Co., Inc. v. Cusick,* 209 Md. 354, 361-62, 121 A.2d 188, 191 (1956). Not until *Nance v. State,* 331 Md. 549, 629 A.2d 633 (1993) was that rule relaxed to permit an inconsistent statement to be admitted as substantive evidence if the statement was reduced to writing and either signed or otherwise adopted by the witness. Thus, Dr. Korell's initial view, expressed *orally* to Ms. Nethercott, that Ms. Lacs had died no earlier than late afternoon on Friday could not have been used as substantive evidence as to time of death but only to impeach the credibility of her testimony that (1) death could have occurred 24 hours earlier, but (2) there was no sure way to tell. To have attempted to impeach that testimony by cross-examining her about her initial view would have permitted Dr. Korell to describe her conversation with Dr. Dixon, to have acknowledged that she was wrong in her initial view, and to have explained why she was wrong. It would have placed before Judge Hinkel no information of which he was not already aware, but may have allowed Dr. Korell to strengthen her resolve about the 48 hours, which would have created an even more dramatic conflict with Dr. Kauffman's opinion.

In announcing his verdict and in denying the motion for

new trial, Judge Hinkel said that he placed no weight on the medical testimony as to time of death.[10] We cannot imagine what additional benefit, as a practical matter, would have accrued to appellant from further impeachment of Dr. Korell. Failure to press the point already known to Judge Hinkel does not, in our view, overcome the presumption of sound trial strategy; nor can we conclude that, as a result of the omission, "the result of the proceeding was fundamentally unfair or unreliable."

We have the same view with respect to the sentencing proceeding. Had the matter been pursued, it would, at best, have brought into question the credibility of Dr. Korell's testimony that death could have occurred as early as 9:00 Thursday evening which, as noted, was more helpful than harmful to the defense. Moreover, Dr. Dixon, in giving a similar opinion, told the jury about her conversation with Dr. Korell, pointing out her disagreement with the time given on the death certificate. The jury had Dr. Comparini's testimony, as substantive evidence, and it also had before it the death certificate signed by Dr. Korell, listing the time of death as

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[10] Appellant contends that, had evidence of Dr. Korell's initial opinion been before Judge Hinkel, he might not have disregarded Dr. Kauffman's view that death occurred on Saturday, September 17. To a large extent, that assumes that Dr. Korell's initial opinion could have been used as substantive evidence for the proposition that it *is* possible to determine more precisely a time of death, which, as noted, is not the case. Moreover, it is clear from his remarks that Judge Hinkel was not relying on the more abstract question of whether it was possible to establish a time of death; he left in evidence that Dr. Korell could not, herself, testify, within a reasonable degree of medical certainty, the earliest time of death and simply did not credit Dr. Kauffman's opinion that death occurred on Saturday, September 17. Discrediting Dr. Korell's testimony regarding *her* inability to determine more precisely a time of death would not have enhanced the credibility of Dr. Kauffman's opinion.

Friday. Even if counsel's failure to cross-examine Dr. Korell at that proceeding could be regarded as deficient, there is utterly no basis for concluding that the result of the proceeding was fundamentally unfair or unreliable. The jury was fully aware of Dr. Korell's initial view, as noted on the death certificate, as well as her conversation with Dr. Dixon. It obviously rejected *all* of the medical testimony attempting to establish a time of death, the least favorable of which to appellant still put the earliest time of death at 9:00 Thursday evening.

Failure to Obtain Forensic Expert

As we indicated above, at some point counsel consulted Dr. Breitenecker as a forensic expert to render an opinion that Ms. Lacs died no earlier than Friday, September 16. Whether they actually had retained him to testify is not entirely clear. When Ms. Nethercott learned that Dr. Korell had changed her opinion as to the earliest time of death, she called Dr. Breitenecker, who informed her then that he was unwilling to testify. That was less than three weeks before trial. She or Mr. Schlaich was then able to retain Dr. Kauffman, but Kauffman was available only for a limited period of time. According to the evidence presented in this proceeding, if the case had been tried before a jury, he would have been unavailable, thereby leaving the defense without a forensic expert prepared to opine that Ms. Lacs died on or after Friday, September 16. That influenced Nethercott and Schlaich to recommend that appellant waive a jury and have the case tried before the court.

In his post conviction petition, appellant contended that, as a result of that situation, he was effectively coerced into waiving a jury and that the waiver was not a voluntary one. Judge Fader found no merit in that argument, and it is not

pursued in this appeal. The complaint here, which was also raised in the petition, is an off-shoot. Appellant contends that the choice, even if voluntarily made, was forced on him through the incompetence of counsel. The nature of that alleged incompetence is not entirely clear. It seems to rest on this statement from his expert, Mr. Fisher:

> "If indeed what was the reason for waiving was simply this whole problem with getting their experts available and being able to go forward, that I think falls below the standards of adequate professional conduct. . . . But they had alternatives to that. They could have sought a continuance; they could have done a number of things that would have taken the dilemma which had been created and set it aside. But they didn't do that.
>
> So if that was the motivating factor or the primary motivating factor in their decision to go judge versus jury then I think that that falls below the standards of competent assistance of counsel."

It does not appear that Mr. Fisher, or anyone else, has faulted counsel for the decision of Dr. Breitenecker not to testify, or for their decision to retain Dr. Kauffman, who gave very favorable testimony for appellant. As Fisher did not specify what other "number of things" counsel could have done, it seems that his criticism lies in their failure to seek a postponement of trial rather than recommend that appellant proceed with a court trial. As Judge Fader noted, however, appellant made clear, when questioned about his choice to proceed non-jury, that it was not based on the availability of Dr. Kauffman or anyone else, but rather on his concern that a jury might be "more likely to go with the State." Other than post-conviction afterthought, there is nothing in the record to

support the claim that counsel were deficient in their selection of experts or to require a conclusion that they improperly induced appellant into waiving a jury trial.

Jury Selection

In his petition for post conviction relief, appellant contended that there was a systematic exclusion of African-Americans from the jury selection process in Baltimore County. That claim was based largely on evidence that African-Americans comprise approximately 12% of the population of the county but that, at the time of his trial and sentencing, less than 6% of the venire panels were African-Americans. After taking a great deal of evidence regarding jury selection procedures in the county, Judge Fader rejected that claim, concluding that "Maryland's system of choosing jurors restricts no distinctive group from serving and favors no distinctive group to serve," and that "[n]othing Baltimore County, Maryland does deviates from the random selection system set up by the Maryland Legislature and included in the Maryland Code." See *Lovell v. State*, 347 Md. 623, 702 A.2d 261 (1997) and *State v. Calhoun*, 306 Md. 692, 511 A.2d 461 (1986), *cert. denied*, 480 U.S. 910, 107 S. Ct. 1339, 94 L. Ed. 2d 528 (1987), where we rejected similar challenges regarding selection procedures in Talbot and Montgomery Counties.

In this appeal, appellant has abandoned the argument made below but has recast it as a claim of ineffective assistance of counsel. He urges now that counsel failed to investigate or present evidence regarding jury selection procedures and failed as well to object to those procedures at the sentencing hearing. The fact is that counsel did object to the array, based on the fact that, of the 104 prospective jurors on the panel, only three were African-American. What counsel did not do was to produce

evidence of any systematic or unconstitutional exclusion. It is clear, however, that if counsel had done the same investigation undertaken by post-conviction counsel and produced the same evidence that they produced, in light of *Lovell* and *Calhoun* the objection would still have been properly sustained. We perceive no Constitutional prejudice to appellant from counsel's failure to pursue an unavailing defense.

Mitigating Evidence

In preparing and presenting appellant's case to the jury at sentencing, trial counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs, or at least at raising a reasonable doubt in that regard. They were, in effect, striving for "two bites at the apple." Notwithstanding that the jury would be, and was, instructed that appellant had been convicted of the crime, the jury still was required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer, and, given the entirely circumstantial nature of the State's evidence and the fact that there was some exculpatory evidence, counsel believed that appellant's best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency.

Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report prepared by the Division of Parole and Probation, which included some of appellant's social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation. He was aware that the jury could regard that background as a

mitigating factor. Indeed, as noted, one or more jurors did find appellant's "background" to be a mitigating factor, although not sufficient to outweigh the aggravating factor that they found. Mr. Schlaich understood that some lawyers use what he regarded as a "shotgun approach," attacking everything and hoping that " something sticks." He was not of that view, however, preferring to concentrate his defense. He did not, therefore, have any detailed background reports prepared, although funds may have been available for that purpose. He expressed some concern that that kind of information might prove counterproductive.

Appellant now claims that counsel's approach was a grievous error, of Constitutional dimension. Post-conviction counsel employed Hans Selvog, a Virginia social worker connected with the National Center on Institutions and Alternatives, to prepare a detailed psycho-social history of appellant, which, indeed, is tragic, rife with episodes of neglect and abuse. Appellant's legal expert, Mr. Fisher, then opined that "the use of an expert in the development of such material [is] ordinarily a minimum requirement for effective representation in a capital sentencing proceeding." On that premise, he concluded that, by failing to retain someone like Mr. Selvog to prepare a detailed psycho-social history and by failing to present information of that kind to the jury, trial counsel did not meet the minimum standards of the profession. Although he said that he had an opinion as to whether the presentation of a report like the one prepared by Mr. Selvog would have had an effect on the sentencing jury, Judge Fader would not let him render that opinion, finding it entirely too speculative. Nonetheless, appellant urges in his brief before us that there is a substantial or significant possibility that he was sentenced to death "because of his counsel's failure to investigate, develop, or present powerful mitigating evidence

of [appellant's] background and mental deficiencies."

Appellant cites a number of cases for the proposition that the failure to investigate and present available evidence of a mitigating factor may constitute ineffective assistance of counsel, arguing that the " Constitution imposes this virtually mandatory duty to investigate mitigating evidence." He asserts that the failure to marshal and present this evidence cannot be justified as a tactical decision, for if it was a tactical decision, "that decision was patently unreasonable." His view thus appears to be that, in every capital punishment case, it is mandatory for counsel to prepare and present to the sentencing tribunal any evidence that could be used by the tribunal to find a mitigating circumstance, and certainly any evidence of the defendant's abusive childhood. A dysfunctional background, while not one of the seven mitigating factors specifically listed in Article 27, § 413(g), may constitute a mitigating factor under the catchall in § 413(g) (8)-- "[a]ny other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case." At least implicit in his argument, and really explicit, is the principle that counsel may not make the kind of tactical decision made in this case--to concentrate their defense and not employ a "shotgun approach," in the hope that "something sticks."

We reject the argument in the broad form that it is presented. In the first place, as noted, counsel *did* investigate and *were* aware of appellant's background. They did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State,* 331 Md. 651, 680-82, 629 A.2d 685, 700-02 (1993), *cert. denied,* 510 U.S. 1077, 114 S. Ct. 891, 127 L. Ed. 2d 84 (1994); *Burger v. Kemp,* 483 U.S. 776, 788-96, 107 S. Ct. 3114, 3122-26, 97 L. Ed. 2d 638, 653-58 (1987). More

important, counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing. Counsel is *not* required to present every conceivable mitigation defense if, after proper investigation and review, he or she concludes that it is not in the defendant's best interest to do so. *See Darden v. Wainwright,* 477 U.S. 168, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986); *Harris v. Dugger,* 874 F.2d 756, 763 (11th Cir.), *cert. denied,* 493 U.S. 1011, 110 S. Ct. 573, 107 L. Ed. 2d 568 (1989) (attorney not obligated to present mitigating evidence if, after reasonable investigation, he or she determines that such evidence may do more harm than good).

The cases cited by appellant for his broad proposition that the failure of counsel to investigate or present mitigating evidence at a capital sentencing hearing constitutes ineffective assistance are all distinguishable. As a preliminary note, in all but one of them the sentencing tribunal, whether judge or jury, was the same tribunal that had determined guilt and thus had already considered and ruled upon the defendant's criminal agency. That is not, of course, a necessarily governing distinction, but it is a factor to consider. There is certainly less advantage to focusing the effort on retrying criminal agency before the very tribunal that has already determined it beyond a reasonable doubt, to the exclusion of other defenses going more directly to discretionary sentencing considerations, than in presenting and focusing upon that issue before a new, untainted tribunal. The cases cited are distinguishable for other reasons as well. In some of them, counsel made no investigation at all of any mitigating circumstances; in others, counsel failed to make a particular inquiry that would have produced significant, highly relevant mitigating evidence. Under the circumstances presented, that failure, the courts held, was not the product of a reasoned strategic decision but simply

deficient. *See, for example, Hill v. Lockhart,* 28 F.3d 832 (8th Cir. 1994), *cert. denied,* 513 U.S. 1102, 115 S. Ct. 778, 130 L. Ed. 2d 673 (1995) (no investigation of significant psychiatric history, including positive reaction to anti-psychotic medication); *Austin v. Bell,* 126 F.3d 843 (6th Cir. 1997), *cert. denied,* 523 U.S. 1079, 118 S. Ct. 1526, 140 L. Ed. 2d 677 (1998) (no mitigation evidence presented; no investigation made of mitigating circumstances); *Hendricks v. Calderon,* 70 F.3d 1032 (9th Cir. 1995), *cert. denied,* 517 U.S. 1111, 116 S. Ct. 1335, 134 L. Ed. 2d 485 (1996) (no investigation into any mitigating evidence; decision made simply to beg for mercy); *Antwine v. Delo,* 54 F.3d 1357 (8th Cir. 1995), *cert. denied,* 516 U.S. 1067, 116 S. Ct. 753, 133 L. Ed. 2d 700 (1996) (failure to investigate defendant's mental condition at time of murder though aware of his odd behavior; defendant found to have bipolar disorder); *Baxter v. Thomas,* 45 F.3d 1501 (11th Cir. 1995), *cert. denied,* 516 U.S. 946, 116 S. Ct. 385, 133 L. Ed. 2d 307 (1995) (no investigation of defendant's significant psychiatric history, including three-year commitment to State mental hospital, though counsel aware of odd behavior); *Com. v. Smith,* 544 Pa. 219, 675 A.2d 1221 (Pa.1996), *cert. denied,* 519 U.S. 1153, 117 S. Ct. 1090, 137 L. Ed. 2d 223 (1997) (failure to investigate defendant's mental state; defendant tortured to death five-month-old baby); *Hildwin v. Dugger,* 654 So.2d 107 (Fla.), *cert. denied,* 516 U.S. 965, 116 S. Ct. 420, 133 L. Ed. 2d 337 (1995) (failure to discover previous psychiatric hospitalizations and suicide attempts); *Rose v. State,* 675 So. 2d 567 (Fla. 1996) (no meaningful investigation of defendant's background; failure to discover evidence of organic brain damage and schizoid personality); *State v. Brooks,* 661 So. 2d 1333 (La. 1995) (failure to discover mental condition relevant to whether defendant under domination of homosexual lover); *People v. Ruiz,* 177 Ill. 2d 368, 226 Ill. Dec. 791, 686 N.E.2d 574 (Ill. 1997) (no investigation at all into defendant's

background); *People v. Howery,* 178 Ill. 2d 1, 227 Ill. Dec. 354, 687 N.E.2d 836 (Ill. 1997), *cert. denied,* 525 U.S. 828, 119 S. Ct. 77, 142 L. Ed. 2d 60 (1998) (failure to present evidence of defendant's significant contributions to community and civic involvement); *People v. Steidl,* 177 Ill. 2d 239, 226 Ill. Dec. 592, 685 N.E.2d 1335 (Ill. 1997) (no preparation at all for sentencing hearing).

The circumstances presented in those cases, and others like them, are not at all what we have here. Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor--the uncontested fact that appellant had not previously been convicted of a violent crime--should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant's unfortunate childhood. As Mr. Schlaich noted, the dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods. Appellant's attack runs afoul of the principle set forth in *Strickland,* 466 U.S. at 688-89, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95, applied by us in *State v. Thomas,* 325 Md. 160, 171, 599 A.2d 1171, 1176 (1992), *cert. denied,* 508 U.S. 917, 113 S. Ct. 2359, 124 L. Ed. 2d 266 (1993), and *Oken v. State, supra,* 343 Md. 256, 283-84, 681 A.2d 30, 43:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance

> requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

Alleged Agreement With Geraldine Armstrong

"[I]n order to preserve the issue for any future review," appellant contends that the State failed to disclose an agreement to treat his girlfriend, Geraldine Armstrong, leniently. Armstrong was arrested with appellant and was initially charged with felony murder, theft, and fraud, the belief being that she was in complicity with appellant in the robbery and murder of Ms. Lacs. The charges against her were eventually dropped, and she testified for the State against appellant. From those circumstances, appellant claims that "there is a significant possibility that Ms. Armstrong received assurances of leniency in exchange for her testimony" that were not disclosed to appellant. No evidence of any such assurances was presented. Both the prosecutor and Ms. Armstrong denied that any agreement or assurances existed, and Judge Fader found as a fact that there was no basis for the allegation. That finding is not clearly erroneous.

Sufficiency of Evidence

Also "to preserve the issue for any future review," appellant urges that no reasonable fact finder could have found

him guilty beyond a reasonable doubt either at trial or at the sentencing proceeding. That question was litigated and resolved by us in appellant's direct appeal. We held that the evidence did suffice to sustain the conviction and the sentence, and we shall not revisit that issue in a post conviction proceeding. Md. Code, Article 27, § 645A(b).

ORDER DENYING PETITION FOR POST CONVICTION RELIEF AFFIRMED, WITH COSTS.

Dissenting opinion by ELDRIDGE, J., in which BELL, C.J., joins.

ELDRIDGE, Judge, dissenting.

Under the Maryland death penalty statute, with one exception not pertinent to this case, "only a principal in the first degree" to murder in the first degree is eligible for a death sentence. The State, at the sentencing stage of the trial, must prove beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. *See* Maryland Code (1957, 1996 Repl. Vol.), Art. 27, § 413(e)(1); Maryland Rule 4-343(g); *Wiggins v. State,* 324 Md. 551, 570-571, 597 A.2d 1359, 1368 (1991), *cert. denied,* 503 U.S. 1007, 112 S. Ct. 1765, 118 L. Ed. 2d 427 (1992); *Johnson v. State,* 303 Md. 487, 510, 495 A.2d 1, 12 (1985), *cert. denied,* 474 U.S. 1093, 106 S. Ct. 868, 88 L. Ed. 2d 907 (1986); *Stebbing v. State,* 299 Md. 331, 371, 473 A.2d 903, 923, *cert. denied,* 469 U.S. 900, 105 S. Ct. 276, 83 L. Ed. 2d 212 (1984).

When this case was before us on direct appeal, Judge Cole and I dissented from the affirmance of the death penalty on the ground that the evidence at the sentencing hearing was insufficient, under the due process standard set forth in *Jackson*

v. Virginia, 443 U.S. 307, 318-319, 99 S. Ct. 2781, 2788- 2789, 61 L. Ed. 2d 560, 573 (1979), for the jury to find, beyond a reasonable doubt, that Kevin Wiggins was a principal in the first degree to the murder of Florence Lacs. *Wiggins v. State, supra,* 324 Md. at 583-588, 597 A.2d at 1374-1377 (Judges Eldridge and Cole dissenting). While observing that the State's evidence "may have been sufficient to establish that Wiggins was involved in the robbery of Ms. Lacs, it was not sufficient to show, beyond a reasonable doubt, that Wiggins was the actual perpetrator of the murder." 324 Md. at 585, 597 A.2d at 1375. The dissenting opinion on direct appeal reviewed the State's extremely weak circumstantial evidence, the lack of evidence showing that the victim died at about the time Wiggins was seen in the vicinity of the victim's apartment, the time sequence problem with the State's case, the evidence conflicting with the State's theory of the case, the lack of any evidence that Wiggins had been in the victim's apartment, and the evidence suggesting that someone else had been in the apartment at the critical time and had been involved in the robbery/murder.

As the evidence and the weakness in the State's case were extensively reviewed in the dissenting opinion on direct appeal, I shall not repeat that review today. For the reasons set forth in that dissenting opinion, I adhere to the view that the evidence was utterly insufficient to show that Wiggins was the actual perpetrator of the murder. Consequently, as a matter of Maryland law, he is not eligible for the death penalty. The maximum punishment which may legally be imposed upon Wiggins is life imprisonment. Code (1957, 1996 Rep. Vol.), Art. 27, § 412(b).

The majority today does not discuss this issue, presumably because it was litigated on direct appeal and because the

Maryland Post Conviction Procedure Act, Code (1957, 1996 Repl.Vol.), Art. 27, § 645 A(a), ordinarily is not a vehicle for relief based on an issue which has "been previously and finally litigated. . . ."

Nevertheless, this issue directly concerns the legality of Wiggins's sentence. An issue concerning the legality of the sentence imposed is not "finally" litigated when decided on direct appeal because, under Maryland law, a "court may correct an illegal sentence at any time." Maryland Rule 4-345(a). As stated by the Court in *State v. Griffiths,* 338 Md. 485, 496, 659 A.2d 876, 882 (1995), "[t]his Rule creates a limited exception to the general rule of finality, and sanctions a method of opening a judgment otherwise final and beyond the reach of the court." The Court in *Griffiths* went on to point out that "Rule 4-345(a) does not preclude action by the trial court on its own initiative, and we have in the past *ex mero motu* directed the trial court to correct an illegal sentence upon remand." *Ibid.*

Since Wiggins was not shown to be a principal in the first degree, the death sentence is an illegal sentence under Maryland law. Furthermore, the imposition of a death sentence, in light of the evidence, is a denial of due process under *Jackson v. Virginia, supra.* I would remand this case to the circuit court with directions to impose a sentence of life imprisonment.

Chief Judge BELL concurs in this dissenting opinion.

Appendix F

STATE OF MARYLAND	*	IN THE
	*	CIRCUIT COURT
V.		
	*	FOR
KEVIN WIGGINS	*	BALTIMORE COUNTY
	*	Case No: 88-CR-5464

* * * * * * * * * * * * * *

JUDGMENT AND OPINION
DENYING POST CONVICTION RELIEF

Upon hearing, presentation of evidence, argument and extensive review of the trial record, it is ORDERED by the Circuit Court for Baltimore County this 20th day of October, 1997 that the petition for post conviction relief filed by Kevin Wiggins (Wiggins or Petitioner) is DENIED.[1]

Petitioner alleged thirty eight (38) separate grounds, some with subparts for a total of fifty-one (52) issues, each of which he argues entitle him to post conviction relief.

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[1] Maryland Rules of Procedure governing post-conviction relief are now contained in Rules 4-401, et. seq. Previously, these provisions were found in the "BK" Maryland rules.

36. THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF THE PROCEEDINGS IN THAT:

A. COUNSEL FAILED TO INTRODUCE EVIDENCE SHOWING THE PETITIONER WAS MENTALLY ILL, HOMELESS AND A VICTIM OF A HORRIBLE CHILDHOOD.

B. COUNSEL FAILED TO CONDUCT ADEQUATE INVESTIGATION OF THE CASE TO DEVELOP EVIDENCE OF MENTAL RETARDATION, THE HOMELESS LIVING CONDITION OF THE PETITIONER AND HIS HORRIBLE CHILDHOOD.

C. COUNSEL FAILED TO INTRODUCE AVAILABLE EXPERT TESTIMONY ON THE ISSUES OF MENTAL RETARDATION, HOMELESSNESS AND HORRIBLE CHILDHOOD OF THE PETITIONER.

The contention

Wiggins emphasizes the importance of presenting mitigating evidence at sentencing. He says that no less a source than the U.S. Supreme court has often acknowledged a defendant's compelling interest in putting such evidence before the sentencer and cites: *Lockett v. Ohio*, 438 U.S. 586, 602-06 (1978); *Eddings v. Oklahoma*, 435 U.S. 104 (1982) and *Penry v. Lynaugh*, 492 U.S. 302 (1989). Further, he states that the Supreme Court has explained why mitigating evidence of a disadvantaged childhood and/or emotional and mental problems play such a unique role in a capital jury's

deliberations:

> If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who has no such excuse. *California v. Brown*, 479 U.S. 538, 545, 93 L. Ed.2d 934, 107 S. Ct. 837 (1987) (O'Connor, J. concurring). . . Only [after the sentencer has been able to consider mitigating evidence] can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. *Woodson*, 428 U.S. at 304-305, 49 L.Ed.2d 944, 96 S.Ct. 2978. "Thus, the sentence imposed at the penalty state should reflect a reasoned *moral* response to the defendant's background, character and crime." *California v. Brown*, *supra*, at 545, 93 L.Ed.2d 934) (O'Connor, J., concurring) (emphasis in original).

Penry, 492 U.S. at 319.

Wiggins also quotes the Court of Appeals opinion in *Woods v. State*, 315 Md. 591, 556 A.2d 236, 242 (1989):

> "[The sentencer's] task within fixed statutory or constitutional limits is to determine the type and extent of punishment *after the issue of guilt has been determined*. Highly relevant -- if not essential -- to his selection of an appropriate sentence is the possession of the fullest information possible concerning the

defendant's life and characteristics."

Petitioner argues that most notable among the duties of trial counsel at sentencing is to make a reasonable decision that makes particular investigations unnecessary and cites *State v. Tichnell*, 306 Md. 428, 509 A.2d 1179 (1986). Other cases cited as to the responsibility to investigate are: *State v. Thomas*, 328 Md. 541, 616 A.2d 365 (1992); *Bowers v. State*, 320 Md. 416, 578 A.2d 734 (1990), *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *Coleman v. Brown*, 802 F.2d 1227, 1233 (10th Cir. 1986); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989); *Deutscher v. Whitley*, 946 F.2d 1443, 1446 (9th Cir. 1991) (consideration of factors that might evoke mercy); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991) (mental retardation); *Osborn v. Shillinger*, 861 F.2d 612 (10th Cir. 1988) (failure to uncover mitigating family background witnesses and medical history when both were available); *Proffitt v. Waldon*, 831 F.2d 1245, 1248 (5th Cir. 1987) (failure to present mental history); *State v. Savage*, 577 A,2d 455 (N.J. 1990); *People v. Ledesma*, 729 P.2d 871 (Cal. 1987) and *People v. Mozingo*, 671 P.2d 363 (Cal. 1983).[258]

Further, Wiggins cites *Brown v. Dixon*, 891 F.2d 490, 500 (4th Cir. 1989) as to the difference between the sentencing phase and the guilt/innocence phase of a trial.

> As far as the [sentencing] jury was concerned, [the] client was no longer the presumed innocent [client] of the guilt phase, but the guilty [client], [his] own views on the matter notwithstanding. For [counsel] to have ignored this cardinal reality would have been to ignore

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[258] Part of this allegation comes from pp. 12-13 of Wiggins' pre-trial memorandum.

> the essence of the adversarial penalty proceeding, in which the only issue is the fate of a guilty defendant.

Presentence Report

A presentence report was done on Wiggins. As to background, it states the following:

PERSONAL HISTORY

> The defendant reports little contact with his natural parents and he spent most of his life in foster care. He estimates he lived in seven or eight different homes, the longest period of which was with a woman who is now deceased. He describes his background as generally "disgusting," but he believes, somehow he "will get it together." He notes that he has lived on the streets since he was sixteen, although occasionally he was able to rent a room. He speaks highly of his half-sister, Charlene, who reportedly shared some of his misery as a youth and they have maintained contact during his period of confinement.
>
> Ms. Charlene Wiggins was interviewed on 7/23/89 and she confirmed that she and the defendant were raised together in foster care. However, she reports that they lived in only three homes, the longest of which was nearly ten years, and, although somehow strict, the last foster mother, Mrs. Lenore Miner, provided "a nice home with a roof over our heads." . . . She also reports that his natural mother, who has had no contact with him, is an alcoholic, but she has no information on his natural father. She also is unaware of any substance abuse history or psychiatric

intervention.

HEALTH (physical and mental)

The defendant describes his health as "excellent" and there are no problems at this time.

The defendant recalls being taken to a counselor when he was age ten for what he describes as "confusion," but he recalls being told that "nothing was wrong." Since then, there have been bouts of depression, which have become more frequent since he has been confined, but he notes that he recently found some degree of tranquility through religion. There is no psychiatric report in the jail file, notwithstanding the reported suicide attempts, and he denies ever being evaluated or treated by a psychiatrist. He does not, however, that a preacher visited him on three occasions but complained on the last visit that the defendant was keeping him from a tennis match.[259]

Trial Counsel

The Wiggins defense team did not have a forensic social worker to do a social history on Wiggins in preparation for sentencing. No social worker, psychologist or psychiatrist testified for Wiggins.

Defense counsel Schlaich said that he had seen cases where a social worker, psychologist or psychiatrist had testified

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[259] The date of the report is 7/28/89. The report is part of the court file. It is sealed, but this court could not find it had been assigned any exhibit number.

and that testimony had backfired. Through cross-examination of the witness at trial, more bad about the defendant had been developed. He testified that on cross examination of these witnesses there were questions asked and answers given that could be construed as seeing the Defendant as a dangerous person and as giving reasons why the jury should not be merciful.[260] There was a PSI done in this case and Schlaich supplied information to the writer of that report.[261]

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[260] P.C. Transcript, 3/28/94, p. 58.

[261] Schlaich had more information than appeared in the PSI report. At the hearing he was questioned by the Wiggins' post conviction attorney:

Q: But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?

A: I believe that we tracked all of that down.

Q: You got the Social Service records?

A: That is what I recall.

Q: That was in the Social Service Records?

A: Yes.

Q: You also knew that there were reports of sexual abuse at one of his foster homes?

A: Yes.

Q: You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?

A: Yes.

Q: you also knew about homosexual overtures made toward him by his Job Corp supervisor?

A: Yes.

Q: And you also knew that he was borderline mentally retarded?

A: Yes.

Q: You knew all --

A: At least I knew that as it was reported in other people's reports yes.

Q: But you knew it?

A: Yes.

Q: And you knew all of those things and you did not retain a forensic social worker to do a social history?

A: As I recall that is correct.

Nethercott testified that Wiggins had cognitive limitations.

Schlaich testified that he had attended Public Defender sponsored seminars while with that office, including one that included a topic on forensic experts. He knew The National Center for Institutional Alternatives as a place he had used in the past in some cases in an attempt to establish mitigation and to find places short of incarceration with recommendations for treatment centers. He had not used them in a capital proceeding. He did not ask that the services of a forensic social worker be obtained to do a social history on the Petitioner. When questioned by post-conviction counsel concerning the holding of certain Supreme Court case names involving mitigation factors, he was uncertain of the specific holding of any of those cases. Schlaich did say that low intelligence and sexual abuse of the defendant could be mitigating circumstances in a capital case.

Trial tactics meant that Schlaich wanted to two shots at the issue of whether Wiggins was a principal in the first degree, In his opinion this was a "reasonable doubt" case on the question of time of murder and the ability of the State to place Wiggins at the scene at the time of the murder.[262]

(P.C. Transcript, 1/28/94, pp. 33-34.)

[262] P.C. Transcript, 3/28/94, pp. 55-56. Questioning of Carl Schlaich:

Q: Okay. Did you bring with you to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury?

A: It is not experience because I don't do that. I try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to do after that point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish

Doering v. State was another death penalty case in which Schlaich participated. That involved the death of an elderly person. Doering introduced numerous mitigating circumstances including testimony by a psychiatrist and psychologist, and the fact that Doering had been sexually abused as a child and was in foster care. The jury verdict was death.[263]

The Selvog Report

Hans Selvog, a licensed (licensed in D.C. and Virginia, not in Maryland) Clinical Social worker with the National Center on Institutions and Alternatives testified at the post conviction hearing.[264] The Center is a private nonprofit agency providing direct services to both the criminal justice and mental health

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with it.

Q: And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?

A: Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.

Q: And what did you think of that as a tactical position to take?

A: It is a difficult position to take. There are things done to try to negate some of the bizarre appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like -- try to remove some of that taint of conflicting story there.

But it seems to me if you can get away without doing it, it would be better.

[263] P.C. Transcript 3/28/94, pp. 52-53.

[264] Mr. Selvog is a Virginia Resident, a Licensed Social Worker since 1990 (Bachelor's Degree, 1976 from Bethel College in Saint Paul; Graduate Degree, 1986 from Virginia Commonwealth University and is employed as a primary therapist doing a number of forensic assessments. His resume was introduced as PC-I. He testified that in Virginia a social worker can diagnose a mental disorder. He was not called upon to express a psychological or psychiatric opinion in the Wiggins case. (P.C. Transcript, 1/7/94, pp. 40-44).

systems, including social histories in capital cases and to acting as a clearing house in mitigation development in capital murder cases. He prepared and produced a document, "Chronological Merit of Kevin Wiggins Social History.[265] Part of this document was prepared through an interview with Wiggins, his mother, 3 sisters, maternal aunt, maternal cousins, and upon a review of his foster care, medical and school records.[266]

Selvog testified at length that Wiggins bore psychological and abuse scars into adulthood as he had suffered from neglect and abandonment in childhood. Wiggins had difficulty distinguishing fantasy with reality and had a poor memory.[267]

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[265] Introduced as PC-2.

[266] P.C. Transcript, 1/7/94. p. 50.

[267] Much of this testimony and the summary prepared referred to newspaper and other articles and concern about attitudes and the affect on an individual's life, when that individual has experienced sexual abuse. The summary contained opinions from physicians and others. Selvog stated, "therapy that goes on between client and patient is very similar fundamentally among social workers, psychologists and psychiatrists.

As found by Selvog. See P.C. Transcript 1/7/94:

Born on 9/2/61, Wiggins was said to be the product of an extra marital affair. He did not know his father. History showed that his mother was often in a drunken state and that Wiggins and other children in the family were witnesses to his mother having sex with other men. The children sometimes went hungry and were physically abused. At one time, Wiggins' hands were burned requiring emergency foster care. At one time he was tested to have an I.Q. of 72.

Experience by the Petitioner with foster care was very bad. It consisted of physical abuse and a foster parent sexually active with him and other children in the household. It was opined that he was starved for affection and needed attention. Other foster placement showed he was reported to exhibit bizarre behavior (sleeping on the floor, refusal of medical attention for a sore throat), and at times he was sexually molested. A report made when he was in the 11th grade by an individual with a Master's Degree in Nursing was that he exhibit bizarre, sometimes infantile and hostile

As regards the Petitioner and his background, Selvog stated: "the effects of that sort of abuse and experiences of neglect cause these sort of behavior problems and emotional problems that Kevin exhibited throughout his life."[268] Additionally, Selvog testified that Wiggins experienced "extreme signs of depression. He exhibits Suicide ideation." Aggressiveness is a frequent symptom of someone who experiences physical and

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behavior. When Wiggins enlisted in the Job Corp, he was sexually molested there, pp. 52, 56-62, 64-78, 79-83. Two particular opinions given by Mr. Selvog bear repeating:

Q. Okay. And what was Kevin's reaction to those beatings?

A. Well, they were very painful. They left him confused, they left him frightened constantly. In that type of environment where you have chronic alcoholic parent, caregiver, the environment is unpredictable; the environment is hostile. So there is constant fear. The effect and the symptoms of which Kevln reports and the sisters report is finding ways to deal with that sort of trauma by blanking out, actually a number of defenses, but blanking out, trying not to feel, trying not to think about anything; sort of depersonalization sort of experiences by looking on these past memories of the abuse as they were occurring or after they occurred as happening to someone else; being -- trying to avoid the feelings of those experiences by -- in one instance in particular Kevin wanted to fly, fly out the window to be free and his sisters had to hold him back. Pp. 62-63.

* * *

Q. What did Lawrence Hines conclude from that evaluation? (the Master's Degree Nurse)

A. Well, he referred to the strange and bizarre behavior of Kevin, being infantile at times, hostile at others. His inability to remain oriented to time. place and person. His history of forgetting things and causing problems in the foster home. His limited intellectual capacity.

And his impression was that Kevin was suffered with mental retardation with cranial pathology and he suggested a physical exam and brain scan. He noted a question of head trauma in Kevin's record. pp. 78-79.

[268] In the opinion of Mr. Selvog, those problems were:

Inability to form attachments. Emotionally shut down and numb, depersonalized, disassociated in terms of not being able to integrate memory, memory identity, consciousness from time to time, which goes to the observation of Kevin as being disoriented to reality. p. 81.

sexual abuse."[269]

In Maryland, a social worker's practice, as defined by the Health Occupations Code, Title 19. H.O. § 19-101, the Definitions Section states:

> (e) *Practice social work.*- "Practice social work" means to engage professionally and for compensation in the following activities while representing oneself to be a social worker:
> (1) Helping individuals, groups, or communities to enhance or restore their capacity for social functioning;
> (2) Seeking to create societal conditions favorable to this goal; and
> (3) By the application of social work values, principles, and techniques:
> (i) Helping people obtain tangible services;
> (ii) Helping persons, communities, and groups provide or improve social and health services; and
> (iii) Counseling with individuals, families, and groups.
> (f) *Practice clinical social work.*-
> (1) "Practice clinical social work" means to engage

[269] Selvog did not know whether the sexual abuse had been reported to authorities. Pp. 89- 90. On cross-examination, the State pointed out some inconsistencies that Wiggins gave to these findings when compared to the presentence report. There, Wiggins had said that his foster mother provided a nice home over the heads of the children. None of the persons alleged to have committed the sex abuse were interviewed because they could not be located. He had not reviewed the Petitioner's criminal record. He admitted that until Petitioner told him about the sexual abuse, not a single report by any other health care professional reported the abuse. Nor was there a mention of abuse against Wiggins in any report of the DSS. Selvog said that the majority of instances of sex abuse are not reported by a victim when the abuse is by a caretaker. pp. 90-93.

> professionally and for compensation in the application of social work principles and methods for the alleviation of social, mental, and emotional conditions through treatment designed to provide psychotherapy for a mental disorder.
> (2) "Practice clinical social work" includes rendering a diagnosis based on a recognized manual of mental and emotional disorders.
> (g) *Social worker.*- "Social worker" means an individual who practices social work.[270]

Once a physician has seen the patient and referred the patient to a clinical social worker, the social worker may make a diagnosis of the person's social, mental, or emotional disorder and may use whatever diagnostic coding is appropriate for the patient's medical records and for insurance reimbursement purposes. 73 Op. Att'y Gem 208 (1988).

There was an objection by the State to much of the testimony that Selvog had to offer. As counsel and the court went through the various questions asked and information furnished, it must be kept in mind that Mr. Selvog is a social

[270] From: HO 19-101:
A license to practice may include a number of individuals:
(c) *License.*-
(1) "License" means, unless the context requires otherwise, a license issued by the Board to practice social work.
(2) "License" includes:
(i) 1. A certified social worker license: or
2. A certified social worker-clinical license;
(ii) Graduate social worker license; and
(iii) A social work associate license.
(d) *Licensed social worker.*- "Licensed social worker" means, unless the context requires otherwise, a social worker who is licensed by the Board to practice social work.

worker. He is not a psychologist, psychiatrist or a medical doctor. He said he was qualified to give a number of different opinions, some of which were allowed by this court and some of which were not. It must be kept in mind throughout all of this that Mr. Selvog, as is the nature of his profession, gives information from reports of others. Some of those reports contain what is classified as professional opinion, which opinion comes from an individual not in court, and not able to be cross examined. Therefore, questions and objections were considered on a question by question basis at the hearing.[271]

In *Booth v. State*, 312 Md. 266, 276, 608 A.2d 162 (1992), a social worker testified as an expert on the "psychosocial assessments and the impact of a person's immediate family and immediate environment on his or her psychosocial development." *Id.*, at 187.[272] in *Bohnert v. State*, 312 Md. 266, 539 A.2d 657 (1988), testimony by a social worker for the State were excluded. Testimony amounted to nothing more than a statement by the social worker that the Defendant was telling the truth. *Id.*, at 277.[273]

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[271] P.C. Transcript, 1/7/94, pp. 46-47, 53-55.

[272] The Opinion by the *Booth* Court shows that the trial judge did certify the witness and said he would permit her to answer some questions, maybe not others depending on the individual question. Obviously concerned over whether the background, training and experience of this social worker would allow her to express all the opinions for which she was produced, the trial judge handled the questions one at a time. This procedure was approved by the Court. The opinion states: "Ms. Alphonso went on to give an opinion concerning how Booth's family life and environment had affected him." *Id.*, at 187-89.

[273] The social worker was called by the State to give expert testimony on the issue of sexual abuse of a child. She had done no objective test. The *Bohnert* Court stated that when the testimony is the functional equivalent of a statement by the witness that what she was told is the truth, that is an invasion of the prerogative of the jury and cannot be the subject matter of

Expert testimony on Ineffective Assistance

Gerald Fisher, Esq., a criminal law practitioner was produced as an expert to testify on the issue of ineffectiveness of counsel. He said that the background information on Wiggins presented by Selvog would not have gone to the detriment of Wiggins. The murder was not one where there was a wild crazy bludgeoning or wild sexual attack. The State reminded him that the victim (Lachs) was an elderly woman, had been drowned in a bathtub, was found not to be wearing underpants, her skirt was up around her waist and black flag & top job had been dumped on her. Fisher responded that while there was no question that jurors would wonder why this happened that overall the background would not work to Petitioner's detriment.[274]

On cross-examination, Fisher stated he knew that the record showed that trial counsel was probably preparing to introduce psychological evidence and DSS evidence had the trial court granted a bifurcated trial separating out the issue of principal in the first degree from other issues. That request for bifurcation was denied by the trial judge.[275]

From Fisher's testimony at the post conviction hearing on the "minimum requirements for effective representation in capital sentencing":

> I think you start at the beginning, which is you first have to go to the Statute and you have to look at whatever statute you are operating under, whether it is

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expert testimony. Id., at 271, 272, 277.

[274] P.C. Transcript, 3/29/94, pp. 80-82.

[275] P.C. Transcript, 3/29/94, pp. 86-89.

Maryland's or elsewhere, to see what the aggravators are and what the mitigators are that are statutorily prescribed. You start thinking about how you are going to try to either undercut the aggravators or to put on evidence in support of the statutory mitigating circumstances.

Then what you need to start doing is to do a complete comprehensive background on the client so that you can not only address those issues but that you can also present additional evidence on what are commonly called non statutory mitigating evidence, things for example under the Maryland statute where the jury either individually or unanimously may be able to say we find the following information to be mitigating and would enter it into the weighing process.

That requires I think at a very minimum is you do a comprehensive psycho-social history on your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive work up of the client. That means not just talking to the client but talking to family members, talking --- going back through all of their social files, juvenile files, criminal records, whatever other files may exist, subpoenaing those records, collecting them.

You try to get everything you possibly can about the client's background to start examining that and developing that for a competent presentation at a sentencing hearing should you ever be there.[276]

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[276] P.C. Transcript of 3/29/94 at pp. 28-29.

Fisher explained that the use of this forensic expert in the development of such material is a minimum requirement for effective representation in a capital sentencing proceeding:

> In capital cases you have to go further . . . and you have to be trained to do it. Most of the people you encounter when you get into these very difficult issues such as abuse, neglect, sexual abuse, other sort of things, the client, the family, other individuals are very resistant to providing information, particularly at the outset. That needs to be developed. You have to have somebody who knows how to delve into that information, how to bring it out, how to look at records and so forth and understand what that means.
>
> I as an attorney can look at a social file on a client. What I mean by social file is a file that might be created when he is a juvenile. I may see certain things. A person who has expertise in this area will look at it and see it at many different layers than I will. They will know how this information came about and they will know that there is more out there.
>
> For me it will be a conclusion. For them it will be a clue. They will take that and go further. That is why you need to have these people who do that and that is what they do and they do it extremely well.[277]

Fisher's opinion was that trial counsel for Wiggins did not meet the minimum standards of the profession overall and in specific matters. As to mitigating evidence:

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[277] P.C. Transcript, 3/29/94, pp. 29-30.

In particular, the things that come to mind is first of all the whole question of their investigation, presentation of mitigating evidence. They simply did not do what is necessary in order to have presented that properly to the Court, to the jury on behalf of their client.

I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into those various problems that he had. And then they didn't present--- I have read this report by Dr. Selvog. **I must say that in terms of Mr. Wiggins background, that the deprivations and neglect he suffered are — they may not be the strongest I have every see, but it is among the strongest I have ever seen. I have seen dozens of background that have been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.**

It certainly does not impress me as being any kind of sound strategic decision to get there. There doesn't seem to be an excuse for them either not having gone out and put it together, because it was --- much of it was there for the taking. And then not presenting it just makes it, it just makes no sense to me, frankly.[278] [Emphasis by bold]

It was Fisher's information that the Maryland Public Defender's office routinely hires experts to do these psycho-social histories, conferences were being held to

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[278] P.C. Transcript, 3/29/94, pp. 32-33.

development of this information as the death penalty law was revived and Schlaich testified that he had attended such a conference.[279] When asked to express an opinion as to whether the failure to present this information had a prejudicial effect on the verdict of the jury, an objection was made and it was sustained. It was this court's opinion now, as it was then, that no adequate basis existed for Mr. Fisher to express that opinion. A guess and speculation is what is attendant to any opinion he would express -- nothing more.[280]

Fisher had reviewed the Seltzer jury composition report (PC 4) and the social history on Wiggins. (PC 2) He stated he was familiar with the family history presented, with the norms and standards expected of a reasonably competent defense attorney in preparation of the mitigation stage in a death penalty case. He said that this did not vary from jurisdiction to jurisdiction as to the type of information contained in PC 2.

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[279] P.C. Transcript, 3/29/94, pp. 33-34.

[280] P.C. Transcript, 3/29/94, pp. 38-39. A proffer was made for appellate court purposes: I think that there is and, in using the standards of Strickland, more than a substantial probability that this failure to present evidence effected the outcome of the sentencing hearing m this case. *Id.*, at 39.

The undersigned judge does not wish to be discourteous to Mr. Fisher. For more than fifteen (15) years I have been presiding over jury trials in Baltimore County, both in criminal and civil litigation, My best guess, knowing the community and with having tried five (5) death penalty cases is that no one can say for sure that the presentation of this evidence worked up by Dr. Selvog would have had any affect the outcome of this sentencing proceeding. I expect the appellate court to give absolutely no value to this guess. Schlaich said it best when he showed apprehension over the introduction of this evidence in a case, where the crime was heinous and where nothing existed to show background would have caused a reflex action on Wiggins' behalf and that the evidence should be suspect at best.

The Selvog report contains the type of mitigating information that is required in death penalty cases.[281] Selvog expressed the opinion that trial counsel did not do a job that met the minimum qualifications of the profession in the preparation and presentation of mitigating evidence.[282] Stating that while the deprivations and neglect Wiggins suffered were not the strongest he had seen, they were among the worst and that the presentation of this history and background should have been presented to the jury.[283] Some Public Defender offices have someone on staff to properly prepare the report. The Maryland Public Defender routinely hires people to do these studies. It was the normal standard to do this preparation in a capital sentencing case.[284]

An important part of the Fisher presentation occurred when he tried to express an expert opinion as to the effect of not presenting this information during the Wiggins case. For appellate court purposes, not for evidence at the hearing he expressed an opinion that there was "more than a substantial

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[281] P.C. Transcript, 3/30/94, page 44.

[282] P.C. Transcript, 3/30/94, page 42.

[283] At the basis of the Fisher opinion, was the numerous seminars he attended and his research on capital issues and by talking to mitigation specialists. First, the statutory aggravating factors and the mitigators have to be analyzed so they may be placed in perspective. This has to be done by someone qualified to do this report. This is a minimum requirement. A complete comprehensive background on the client the needs to be done, including a psycho-social history by someone experienced in doing the comprehensive work. This includes talking to fatuity, going back through social files, juvenile and criminal records, etc., so that everything may be obtained to develop a competent presentation at sentencing. The one who does the report needs to be trained so information may be obtained from some individuals who are often resistant to give information on the neglect and abuse issues.

[284] P.C. Transcript, 3/29/94, p. 34.

probability that this failure to present evidence effected the outcome of" the sentencing hearing in the case." Because the analysis here was only as a result of a two (2) case comparison and otherwise there was an insufficient basis for the opinion to be expressed, this court at postconviction would not allow this testimony.

> Q: Mr. Fisher, could you give us your opinion, your expert opinion on what the minimum requirements for effective representation in capital sentencing are?
> A: . . . [Y]o have to go to the Statute . . . To see what the aggravators are and what the mitigators are that are statutorily prescribed . . .
>
> Then what you need to start doing is to do a complete comprehensive background on the client so that you can not only address issues but you can also present additional evidence on what are commonly called non statutory mitigating evidence . . .
>
> This requires I think that at a very minimum you do a comprehensive psycho-social history of your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive work up of the client. That means not just talking to the client but talking to family members, talking -- going back through all of their social files, juvenile files, criminal records, whatever other files may exist . . .[285]
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> Q: . . . In your expert opinion is the use of an expert in the development of such material ordinarily a minimum requirement for effective representation in

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[285] P.C. Transcript, 3/30/96, pp. 28-29.

a capital sentencing proceeding?

A: Yes

A: . . . In the normal criminal case if you are trying to put on sentencing information on behalf of your client . . .

In capital cases you have to do further than that and you have to be trained to do it.[286]

. . . I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into these various problems that he had. And then they didn't present --- I have read this report by Dr. Selvog. I must say that in terms of Mr. Wiggins background that have been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.[287]

When Mr. Fisher was asked what the likely impact of the failure to develop this evidence was on the jury verdict in the *Wiggins* case, the State objected and the court sustained the objection. The undersigned judge was emphatic in determining that the basis for the expression of an opinion was wanting:

> THE COURT: I can only say in my experience of sixteen years on this bench if this fellow was allowed to express the opinion on the meager little evidence

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[286] *Id.*, at 29.

[287] *Id.*, at 32-33.

> that he has presented to us as far as comparison is concerned, then anyone should be able to express an opinion on almost everything.
>
> With that, I'm in the business of reading juries and judges and knowing. He certainly does not have an adequate basis to express that opinion. I will allow you to proffer it for appellate court purposes but will not consider it as evidence in the case . . .[288]

The question of prejudice and how it is resolved in this situation is interesting and important. While any opinion of Fisher as to what the jury would have done is fraught with speculation, how is this to be handled if a valuable right has been taken away from Wiggins? It this right one of constitutional significance? If so, then would extinguishing the right to put on mitigation due to ineffective assistance of counsel, mean that Wiggins would be entitled to a new trial where the mitigating evidence could be presented?

As to the tactic by Schlaich to retry the guilt/innocence issue again at sentencing, that should not have been done, said Fisher, to the exclusion of the presentation of other mitigating

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[288] *Id.*, at 38. Questioning by way of proffer for appellate court purposes developed by question and answer to Mr. Fisher. The opinion testimony given:

A: (Mr. Fisher) Again, I have done a lot of reading on this particular issue about what juries are concerned about as far as mitigating evidence, The things that are in Kevin Wiggins's background, the neglect, the abuse, really basically abandonment as a child and then when he finally gets into some stabilized situation exacerbation through abuse is extremely strong mitigating evidence.

In my opinion had that been presented, that the outcome of this sentencing would have been different.
Id., at 40.

background information.[289] When questioned concerning the potentiality of this mitigating information producing an unfavorable result:

> First of all you have to develop it and you have to work on how you are going to present it to even made that determination. You can't--saying that you are not going to present psycho-social background information because there is a risk that it can be death with effectively in cross- examination is somewhat akin to saying on a guilt/innocence trial I never present self defense claims; I never present alibi claims, I never do those sort of defenses because there is problems with them.
>
> Every defense has problems but you have to go out and investigate it, develop it, decide on the presentation and then weigh what is going to go on with that presentation in determining whether to use it or not to use it. So as a kind of preliminary step that wasn't done.
>
> Then in addition, again, I just go back to the qualify of this evidence. It is extremely compelling mitigating evidence. I think had he done the background as he should have, when he looked at this evidence it is not a sound decision not to present it. And, indeed, a glimmer of it got to the jury in some form, either the presentence report or something that they picked up because it was in there a little bit but not developed in any way.

[289] P.C. Transcript, 3/30/94, page 46.

> So the notion that there was a tactic in not presenting it makes no sense because it was at least there in the evidence a little bit but not presented in any coherent fashion.
>
> Again, if -- the presentence -- I read the presentence report in this case and there is two paragraphs about Kevin Wiggins' background that just touch upon the problems that he had and nothing more. There is no independent investigation, any kind of workup.
>
> If the tactical decision by Mr. Schlaich was not to present evidence, obviously that is contrary to it because he got it to the presentence report writer in some fashion. But if he had it, at least he had the beginnings of it and he had no resources impediment to doing a further investigation, then he could have and should have gone out and developed it.
>
> This notion that there was a downside, it just doesn't make a lot of sense because he ultimately presents it in some way, at least in very, very limited way. He should have developed it. presented it more fully. He should have developed it.[290]

Analysis and Decision

Numerous cases state emphatically that when the introduction of evidence, when the decision not to cross-examine, when the decision not to investigate, etc., is a matter of trial tactics, there is no ineffective assistance of counsel. Trial tactics is what we are dealing with in

[290] P.C. Transcript, 3/30/94, pp. 47-50.

consideration of this issue. Schlaich had good reasons for the decision he made, some will agree with his decision, some will disagree, and the law stays neutral.

* * * *

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None of the above decisions is on a direct parallel with the facts in this case. To argue differences, is to argue differences that matter not. This court does not accept Fisher's testimony that it was error not to present information along the lines of the Selvog report. Schlaich made a tactical decision and it was reasonable. Further, Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature. Lastly, how do we know what information would have been presented by the State to contradict what was contained in Selvog's report? We have seen instances where the defense does a work-up, the State does a work-up, and the trial goes forward without either because the defense is worried about how wide the door will be opened.

* * * *

Appendix G

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
May 29, 2002

No. 01-23
CA-99-2420-JFM

KEVIN WIGGINS
Petitioner - Appellee

v.

THOMAS R. CORCORAN, Warden, Maryland Correctional Adjustment Center; WILLIAM W. SONDERVAN, Commissioner of Corrections of the State of Maryland; J. JOSEPH CURRAN, JR.
Respondents - Appellants

On Petition for Rehearing and Rehearing En Banc

The appellee's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and

rehearing en banc is denied.

Judge Motz took no part in consideration of the case.

For the Court,

/s/ Patricia S. Connor
CLERK

Appendix H

Statutory Provisions Involved

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 153--HABEAS CORPUS

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the

applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Appendix I

SOCIAL HISTORY OF KEVIN EUGENE WIGGINS

(1) INTRODUCTION

Kevin Eugene Wiggins was born on September 2, 1961 at Sinai Hospital in Baltimore, Maryland. He is now 31 years old. He is one of two children born to Jean Wiggins and Lester Evans. Mrs. Wiggins was married to Donald Wiggins and Mr. Evans was reportedly also married with a "houseful of kids" when the two engaged in extramarital affairs. Kevin has only limited knowledge of his biological father. Father and son have never met.

Kevin has three sisters: India Evans (34) (also a product of the extramarital affair), half sister Charlene Wiggins (33) (daughter of Mr. and Mrs. Wiggins), and half sister Patricia Marvin (20), whose father is unknown. India recently completed in-patient hospital treatment for cocaine abuse and is presently in a group home aftercare program. India has three children whom she abandoned because of her substance abuse. Her children are wards of the State. Charlene lives in Baltimore and has two children.

Mozelle Jones, Jean Wiggins' sister, explains that when India was born Jean was single. India's father, Lester Evans, was married with many children. Jean did not want any children. Nevertheless, on June 18, 1958, India was born at "city hospital," now Francis Scott Key Hospital. Jean was 21 years old at the time. After India was born, Lester Evans ended his relationship with Jean. She began drinking to cope with his

rejection. Jean has been chronically abusing alcohol since this time.

In 1959, during her pregnancy with Charlene, Jean married Donald Wiggins, Charlene's father. (Mr. Wiggins died in 1973.) Mozelle Jones believes, however, that after the Wiggins marriage Lester Evans and Jean Wiggins recommenced their affair, resulting in Kevin Wiggins' conception.

Jean has another daughter named Patricia Marvin. Patricia lives with Mozelle Jones and recently delivered a baby. Mozelle states that Jean, when intoxicated on alcohol, left Patricia (who was two years old at the time) in a taxi cab. Mozelle states that Jean was very cruel to her children.

II. MATERNAL BACKGROUND

(1) Mother's History

Mozelle Louise Jones, Kevin's maternal aunt, states that Jean Wiggins is the third of five children parented by Jake (deceased, 1964) and Mozelle Williams (deceased, 1971). Their youngest brother, Jakey, who has been "in and out of jail since birth," recently died of a brain hemorrhage which occurred after he was beaten while incarcerated in Hagerstown.

Mozelle states that her father worked as a maintenance man for the Essex housing project in Baltimore. Until his death, Mr. Williams worked seven days a week from 6:00 a.m. to 11:00 p.m. Occasionally, he came home for dinner before returning to work. Mrs. Williams was a housewife. She disciplined the children by binding their hands to a bed and then whipping them with a belt.

(2) Mother's Substance Abuse

Jean Wiggins' alcohol addiction is well known. Although she had four children, she abandoned them for days and weeks at a time, leaving them alone with the oldest daughter, India, to care for them. When she did return home, Kevin recalls her coming in drunk, changing clothes and leaving again.

Angela Patterson, Mozelle's daughter, remembers Jean Wiggins:

> My aunt has been an alcoholic as far back as I can remember. She has never had a job. She drank every day -- Richard's wine. She drank in the morning. She often had D.T.'s in the morning until she had her wine; her whole body shook. She'd drink all day, then leave to go somewhere and come back. She'd never eat. She would leave for days and come back with her face all messed up from where she fell. She would get real drunk. She'd cuss and hit me, get in my face and cuss me out. She was very mean when drinking. My aunt slapped me and made me cry. I was scared of her. She was nice until my mother left and then she would look all crazy and start stammerin'. It frightened me.
>
> When I was a teenager, I started to fight back. When I was 13 or 14, I wanted to kill her. She would often talk to herself, like she was talking to someone in the bathroom. She'd talk as if someone was there but no one was there. She had blackouts, once when I was in the room with her and another time a stranger had found her in the street and brought her home. I also remember finding her passed out in the gutter and

calling the ambulance to take her to the hospital. She tried to commit suicide once. She hung by her hands from the second story window. She had taken a bath, was in her nightgown and I heard my mother start yelling at me to come. Jean let herself go and the fall broke her leg.

III. KEVIN WIGGINS' EARLY CHILDHOOD

(1) Maternal Neglect- Malnutrition

India Evans states that she lived with her mother Jean, brother Kevin and sister Charlene in a small two room apartment at 2007 Greenmount Avenue near the corner of North Avenue in Baltimore. Jean was rarely home, leaving the children alone in the house for two to three weeks at a time. Each time she left, Jean would lock the door to the kitchen. India would try to find money that Jean had hidden in the house. She would then use any money she found to buy food for herself and her siblings. Anticipating her mother's abandonment, India hid bowls, a saucepan, spoons and forks to use during her mother's absences, knowing the children would be barred access to the kitchen. They ate mostly junk food and rice, which was the only thing India knew how to cook. She bought the rice at the store and cooked it on the heater or radiator.

India states that a neighbor woman who lived downstairs fed them on occasion. Then India would go to her aunt and uncle, Arthur Williams, Jean's brother, and his wife Heedy Cole, who lived around the corner. India would also go door to door in the neighborhood and she would panhandle outside a local bar. Finally, she would eat from trashcans. India believes she caught a disease from eating garbage because she

developed sores on her legs. The sores became infected and left scars. She was also treated for malnutrition during this time.

India would tell her neighbors lies about her mother when she begged for food. She would say, "Mother had to go out of town because someone died, can you give us things to eat until my aunt comes."

Kevin distinctly remembers his mother leaving them alone and locking the kitchen. Kevin remembers the hunger:

> We were starving. I'd eat paint chips. She would leave us hungry -- so hungry. We'd take a box of cereal and eat together out of a big pot. When she came home she was drunk and thoughtless. She'd come in, change clothes and leave. She'd lock the kitchen even though she would get herself something to eat when she came in. I had no food for days, ate paint chips from the window sill and drank water.
>
> She was very abusive if she came home and found the lock to the kitchen broke. She'd act like we did a crime. She would hit me up the side of the head and throw a book at me.

(2) Physical Abuse

When Jean did return home, she would usually stay no more than one day. If she brought company with her, the children would be kept in the one bedroom with the door closed while Jean would drink with her friend. Kevin recalls that his sisters were beaten often and India received the worst whippings: "Momma whipped all over her body; she was crazy

then."

India was beaten fiercely and more often than her siblings because she would tell her mother that she was responsible for taking money and breaking into the kitchen. Jean Wiggins would beat India with a chair. Jean once whipped the little girl with a white shirt, causing a button to catch in her eye. On another occasion India's nose was split and her head was lacerated when her mother threw her against the radiator.

Kevin states that when his mother returned home, she'd say, "How you all been in this kitchen -- someone in the milk and cereal." She would beat all three children. She would beat India the worst because she was the oldest. Kevin remembers India being beaten with an extension cord and that she screamed while being hit.

India states that at night, she and her siblings were always scared and stayed huddled together. If one child had to go to the bathroom, they would all get up and go together because they were frightened to be alone. They slept with the light on. Whenever they heard an ambulance pass in the night, they fretted out loud whether their mother was in the ambulance: "Hope that ain't our mother in there," India remembers saying.

Kevin states that he and his sisters "stayed scared all the time." He states that, "Every time Jean came home we got a beating for something." Kevin wanted to jump out the window to see if he could fly. His sisters held him back: "I wanted to fly." Kevin recalls wearing dirty underwear and t-shirts and having a nappy head. "I was dirty, hungry. I felt like nothing and was nothing." He cried all the time: "People heard me but no one could help me."

The children would often cry together because they missed their mother. Kevin cried all the time, "When is mommy coming back?" Kevin would wake up at night crying for his mother. India would try to comfort him and tell him that she would be back, but Kevin continued to cry. Many times, Kevin's constant crying drove India to react violently toward her brother.

India remembers her rage when Kevin "was always whining and moaning for his mommy." Frequently she grabbed her brother by the arm, and pulled him into the bathroom. She took his clothes off and placed him across her lap. She took a safety pin, straightened it out, and poked him in the buttocks over and over again, blood oozing from the pin holes, telling him to "SHUT UP!" This was her way of "shutting him up." While stabbing him with the pin, she punched Kevin in the face several times. She states, "I did this often."

(3) Hospitalization Due to Burns Inflicted by Mother

India recalls that one day Kevin set a brown bag on fire while playing with matches and the flames accidentally caught the curtains on fire. Jean, who was drunk at the time, doused the curtains with water and then turned on the gas burners on the stove. She then turned the burners off, took Kevin by the wrists, forced his hands against the hot metal grates and held them there. Kevin screamed in pain, crying and yelling "It's burning, it's hot!" India and Charlene were also screaming for their mother to stop. India could not believe this was happening. She could not believe that her mother was intentionally burning her brother's hands. India remembers looking at her own hands to see if it was happening to her: "It was so horrible!"

After Jean released Kevin, she wrapped his hands with a sheet. He continued to cry and scream in pain. After several hours, Jean began to beat Kevin with a belt because he would not stop crying. She yelled, "I told you not to mess with matches, now stop crying. This is what you get." Kevin could not stop crying. Jean unwrapped his hands which hurt Kevin and made him cry more because the bandages stuck to his flesh. She placed his hands in ice water and then rewrapped his hands. Kevin continued to scream. Jean was finally compelled to take Kevin to get medical care. As they were leaving, India recalls her mother saying to Kevin, "You don't tell them I did this. You played with the stove and stuck your thumbs up there -- if you tell I'll beat your butt!"

Kevin recalls:

I played with matches a lot. I loved the flame. The colors were so pretty. I watched the light under the furnace. I was comparing the colors of the match to the furnace. I was downstairs looking at it.

Suddenly, I heard footprints and screaming. My mother grabbed the back of my shirt and dragged me upstairs. She was fussing, 'You like to play with fire? Look at me! Answer me boy!' She lit the stove real hot. I could feel the heat. I was not scared at that point. Then she grabbed my wrists and stuck my hands on the stove. I felt the sting and the next thing I know I was waking up in a room with something over my face. A woman said not to move and was stroking my head. She was a nice woman and looked at me nice and said "poor baby." She was gentle to me. My fingers hurt and were tied up in the air. I received medication in a white cup. The food was

good: potatoes and gravy and jello; I had never had jello before.

India believes Kevin stayed in the hospital for approximately one week recovering from the burns on his hands. His hands were in a cast suspended above his head.

(4) Sexual Abuse

When India was eight and nine years old she was repeatedly raped by one of her mother's boyfriends. He would come to the house during Jean's lengthy absences. He took India into the bedroom and made her have intercourse with him. India was treated for a vaginal infection at that time. She told her mother about this boyfriend but her mother would not believe her.

Kevin recalls that a man who had a key to the house would come by when his mother was away. He would unlock the kitchen door, set up the cereal for them to eat and then take India into the bedroom. He distinctly remembers the man saying. "Don't dirty nothing - your mother knows when you dirty up the kitchen." Afterwards, India would complain of stomach pains. Kevin felt bad that he couldn't do anything to help his sister. Kevin remembers thinking, "That man is awful; he did something awful."

India says that she and her siblings shared the one bed in the home with their mother even when she had a man sleeping with her. Jean, heavily intoxicated, would have intercourse with men while her children were in the bed. India recalls poking sticks up her mother's vagina while she lay passed out on the bed.

(5) General Neglect

India states that during Jean's frequent and lengthy absences, Kevin would injure and degrade himself when he became upset. He banged his head against the wall, spit on himself and scratched with his fingernails from the top of his forehead downwards across his face to his chin. Kevin often remained home alone while his sisters attended school during the day. Being left alone especially frightened him.

The house was continually filthy. Jean never cleaned and dirty clothes lay about throughout the house. There was no soap with which to wash anything. India states that she and her siblings never received anything for Christmas when they lived with their mother. They did not celebrate Christmas. The only toys they had were given to them by neighbors. It puzzles India that other relatives who were aware of the situation did nothing to intervene.

Finally, when India was nine years old she told the principal at school (P.S.#7) about her situation and the children were placed in foster care.

[India says that she left the Miners' home (her last foster placement) when she was 20 years old. She began drinking alcohol after she left. Five years ago she began using crack cocaine. She was haunted daily by memories of her mother's abuse and the man who raped her while they lived on Greenmount: "It pops in my mind each and every day." She used crack cocaine to block the memories.]

IV. FOSTER CARE PLACEMENT HISTORY

A. Petition of Neglect and Abandonment

According to case workers Nadia Grove and Willie Dawkins, the following factors precipitated the removal of the Wiggins children from their mother's care:

> On 2/6/67, Policewoman Franz . . . petitioned Juvenile Court, having found the three children of Mrs. Wiggins apparently abandoned by their mother. The mother had apparently left vague instructions with the woman who occupied the apartment beneath her about finding the children and this woman, name unknown at the time of this dictation, had been semi-supervising the children for several days. Details of this situation will be known after the commitment hearing, which is scheduled for 3/6/67, and at this time it is only known that Mrs. Wiggins has acknowledged that she was hiding from the police during the day, since she believed there was a warrant out for her on charges of assault. Mrs. Wiggins claims she was returning to the home at night, but the children have stated that she was not there . . .

Mrs. Wiggins has a known alcoholic problem, that is evident in an interview. She states she also has kidney trouble, or a difficulty with her bladder. It is clear to me that Mrs. Wiggins drinks a good deal. When I asked her about this, and she denied it, she stated, "I don't really drink, I just drink beer." And then her eyes really lit up, and she gave me a broad smile saving, "I LOVE beer!" She told me that she drinks with her girlfriends, and that they treat her.

When I asked her how much beer cost, she gave me the price for quart bottles automatically, as though she never consumed a lesser amount.

Mrs. Wiggins is a complaining and sometimes sullen woman, but on the two occasions I have met her since the placement of the two children, she very quickly changed her attitude from one of extreme anger to a rather curious joviality, directing her anger at PA, and seeming in many ways very unconcerned about foster care, and amused by the CD worker's questions. She joked and laughed at her own misadventures, and was very amused with herself when in signing the medical consents for the children she found that her hand trembled so she could scarcely make a legible signature. I would say with CD she has been cooperative to the extent that she is able. I can see that Mrs. Wiggins could be very disagreeable if she chose, however. She related to me her feelings when she stabbed a man recently. . . She stabbed him with a can opener, and he needed to be treated at Mercy Hospital . . . Later she said, "I tried to eat him up, I wanted to kill him for taking my money.". . . She told us she had never had enough money on welfare for herself and the children, and stated, "I go lacking for them, and I need more than they do."

. . . These children had obviously been very very neglected, although they were reasonably well clothed when they entered foster care. They told the policewoman on 2/6/67 that they had nothing to eat since 2/4/67, when their mother had returned to the home and given them each a bologna sandwich. India Evans stated that she had seen her mother on the

sidewalk from the police car, and she showed no regret or concern about her mother. While Charlene did seem to want to defend her mother a little bit and told me that their mother had bought them lots of lovely clothes which were at home. India and Kevin, when foster care was explained to them, agreed readily that it would be very nice to go to a foster home, and were not at all unhappy about their mother's not being along with them, as they encountered this move.

B. Tinkler's Home (2/6/67)

Kevin and his two sisters were initially placed in the home of Mrs. Laura Tinkler for emergency foster care. Once the family arrived at Mrs. Tinkler's, the children were required to attend the House of Prayer with the Tinklers each and every evening from approximately 8:00 p.m. to midnight, even though they were to attend school the next day. They attended church services all day on Saturdays and Sundays. On Saturday they had to fast until 2:00 p.m. The church was some distance from the house. It was a charismatic service which included people shouting and falling down. The church was very noisy. India recalls feeling very tired the next school day. The daily routine consisted of school attendance, homework, chores and church attendance until midnight.

India believes that she and her siblings were transferred to Mr. and Mrs. Miner's home after it was discovered that Mrs. Tinkler was physically abusing the children. During a physical examination, doctors saw marks and scars on the children's bodies which were made by Mrs. Tinlder's fingernails. She would pinch and twist the children's flesh, leaving wounds. Charlene states that Mrs. Tinkler tried to deter her from sucking

her thumb by biting it, and she would beat her and her siblings with many different objects.

C. Miner's Home (3/29/68-9/8/77)

Kevin, his sisters and several other children lived in the home of Lenore and Charles Miner. The number and names of the other children fluctuated over the nine years that Kevin lived in this home. Kevin describes Mrs. Miner as a controlling person. She would give each of the children chores (i.e., sweeping steps, separating the clothes for washing and wiping windows) to complete on the weekends and would not allow them to be out after 8:00 p.m. If the children disobeyed her, she would beat them with either her fist or another object such as a switch. Mrs. Miner was reportedly an aggressive woman who ruled her household in a militaristic manner.

India remembers that Mr. Miner would force Charlene to undress and stand naked while he gawked at her for five to ten minutes. Charlene was 11 or 12 at the time. Mr. Miner chose Charlene rather than India for this abuse because Charlene was physically more developed than India. India once challenged this practice of humiliating Charlene. Mr. Miner then told India to strip her clothes off and then whipped them both with a belt. After that incident, however, he stopped making Charlene take her clothes off. India also recalls Mrs. Miner beating them with a belt or switch and sometimes both. She would stand up, place the children's head between her shins and switch them at least ten times across the buttocks. The strokes left welts.

Kevin states that, in spite of his disagreements with Mrs. Miner, she was a good woman with strong morals. Kevin says that the years that he lived with Mrs. Miner were the best years

of his life.

When Kevin began to live with the Miners, Charles Miner would wrestle with him. Kevin was eight years old. Mr. Miner pulled Kevin's pants down and fondled him. He eventually digitally penetrated Kevin's anus and attempted penile penetration on many occasions. This occurred as often as every day to once a month. When the sexual molestation first occurred, Kevin told Mrs. Miner about it. She called him a troublemaker and a liar. Kevin, with difficulty and shame, remembers the sexual abuse:

> It happened two or three times a week, sometimes everyday – always during wrestling down in the basement. While wrestling he'd pull my pants down. He'd use some grease or Vaseline and if I would get to making a noise he'd say "okay – I won't go any further." He kept trying though and I remember specks of blood after he did. Mr. Charles would play with me, he didn't penetrate, just fondling. He'd call me his "little man." I was starved for attention. Mr. Charles would say, "You can take it, my little man."
>
> I have a confusion about Mr. Miner. Now I see it – Mr. Miner doing it to me. Sometimes, I would like it. I would accept it; I would help it sometimes; I would do it. When I was younger I wanted to be around him; I'd prop up on his lap. Sometimes I initiated it because I wanted to be with him – it really messed with me. I'd ask myself, "Why a male child?" It messed with me. I wanted a father and mother real bad. I remember as a little kid, sitting on the porch and seeing the family next door taking family trips. I'd hear, "Everybody in the car. Okay dad." I wanted

a dad and mom and when I was 20 I was still looking for a dad and mom.

I was nice to Mr. Charles when I shouldn't have been. Even when I knew what he was doing, I got on his lap and stuff. Mr. Charles would rip and run on Mrs. Miner. He spent more time with me than anybody and he made me feel special. When he came in he'd say to me, "Here I am!" He'd buy me candy and cupcakes.

When it first started with Mr. Charles, he put something on his hand. He said, "If you can take all this finger in, you're a man – come on, come on, you can do it. Don't be tense, try not to be tense." He'd help me with my breathing. (The second time it happened I told Mrs. Miner and she said I was a liar and a troublemaker.) I was feeling strange but I was getting used to it; it started to feel natural, with the finger then. I took his hand but I felt like I wanted to go to the bathroom and I'd go to the bathroom. That's when I wasn't eating. Things happened so fast. I couldn't understand. Was it right? I guessed it was especially since Mrs. Miner said I was just being a troublemaker. I learned it didn't do any good to scream; no one believes you; they turn the other way. Life is crazy, bizarre.

Mr. Charles would look me in the eye and tell me he loved me. I loved him as my father. I could of been a real son to him. I felt he cared about me. Sometimes he did it with me everyday. Sometimes it wasn't for a month. I'd miss him. I'd ask him, "Did I do something wrong?" He'd say he just had some

things on his mind. I felt guilty when I thought he was mad.

According to Kevin, Mr. Miner worked loading trucks for B.E. Green in downtown Baltimore. Kevin stated that Mr. Miner was nervous and smoked two to three packs of cigarettes a day. He remembers the house clouded with smoke and 20 to 30 cigarette butts in the ashtrays. He seemed to Kevin to be a depressed man. Mr. Miner's hand was amputated because of disease.

Corresponding with the onset of his sexual molestation by Mr. Miner, Kevin was unable to eat. Mrs. Miner could not get him to eat. Kevin would put sausage and pancakes in his pockets as well as his dinner, which included steaks, and throw them away. He states, "There was too much on my mind." Mrs. Miner beat Kevin for not eating and for throwing his food away. He lost weight and his ribs stuck out. He was taken to the University of Maryland hospital and he was given a yellow, chalky tasting medicine which helped his appetite to return.

While at the Miners, Kevin was psychologically tested on August 6, 1968. The follow-up report, prepared by caseworker Frances Newby on August 8, 1969, states:

> Kevin continues to have very poor self-help skills. He puts his rubbers on wrong feet, socks on inside out, and in the wrong position to fit his foot properly. He cannot button his shirt so that the button holes and buttons match evenly from top to bottom. Kevin is extremely lethargic about dressing, eating, and doing most activities. His memory seems poor. If the fostermother sends him upstairs on an errand to fetch something, he forgets what he has gone for on the

way. If she tells him about something and asks him a few minutes later what she has said he has forgotten it.

. . . He seems happiest when playing by himself and with his toy soldiers. These he lines up and knocks down over and over again rather than playing creatively with them. *Kevin still has difficulty distinguishing between fantasy and reality*. (emphasis added). He described seeing camels grazing by the roadside (he may have mistaken this for another animal but the foster mother stated she saw no other animals in sight) and other incidences from his mind as if they were real.

Kevin's attention span is very, short. He has poor ability to concentrate. He seems somewhat anxious and nervous but not hyperactive. Kevin cries easily when he cannot have his way. He is extremely hard on clothes. He comes home very dirty and messy. He does not verbalize much on his own initiative. He also does not like physical affection from the foster mother.

A psychological evaluation by Sarah T. Strata prepared on October 14, 1968 states:

> Kevin. . .has large eyes which usually have a staring expression. His bodily movements are lethargic, his voice is generally soft and with flat vocal tones. In general he seems to be an emotionally flat and expressionless child. When asked, he did not know how old he is.

Department of Public Welfare records state that Kevin was taken for psychological testing because of unusual behavior at home and difficulty in school. On March 11, 1970, BCH (Baltimore City Hospital) stated that, "Teacher reports . . . fails asleep in class. At other times he runs around the room and disturbs the other children. His work is . . . complicated. She says he exhibits peculiar behavior."

On December 22, 1970, Mrs. Miner took Kevin to be evaluated by Dr. Rosario Dancel, pediatrician. In a report dated February 9, 1971, Kevin was found to have a full scale I.Q. of 72. Dr. Dancel wrote:

> Kevin is underachieving, hyperactive and observed to have 'staring spells' frequently. These latter symptoms are the concern of the school. He was showing learning difficulties from the time he started school at six years of age. An I.Q. test at that time was reported to be 72. He repeated the first grade and then was placed in a special curriculum class. Even in this class, however, he is adjusting very poorly. He is hyperactive and has a very short attention span. He hasn't learned the alphabet yet in the two years he was in school. The foster mother claims he was slow from the beginning, but is not hyperactive. He stares blankly oftentimes but could be aroused by loud noise or voices. . . Blank staring was also noted but not that of petit mal seizure.

Dr. Dancel also referred him for an electro-encephalograph, which was performed by Dr. G.G. Sutton. A highlight of Dr. Sutton's results state: "The findings suggest seizure disorder without evidence of a discrete epileptogenic focus."

According to John Martin, caseworker, on October 10, 1973, he wrote:

> The children haven't seen their mother since placement in the Miner home and Mrs. Miner states that she has heard nothing from Mrs. Williams [Wiggins] at all. I asked the children if they would like to have a visit with their mother and they all answered yes. I told them I had been trying to locate their mother but had had no success yet but that I would continue trying to find her.
>
> I didn't meet Mr. Miner but Mrs. Miner impressed me negatively. This lady is overweight and walks like a first sergeant. She impressed me as grossly loud and overpowering although the 3 children who were present for my entire visit didn't seem intimidated in any way – I feel sure that Mrs. Miner rules them with excessive authority.
>
> Mrs. Miner said she does spank the children with a strap, shoe or hand when they need punishment. I pointed out to her that this corporal punishment is against agency policy and that she should punish the children by methods such as communication, counseling, withdrawal of privileges, extra duties, confinement at home and so forth.

On April 22, 1974, John Martin stated:

> Kevin is in Special Education class at Edgecombe Elementary School, where he makes C's in all of his classes. He gets 2 in conduct as a result of being noisy and disruptive in class.

Kevin remembers being confused about his life: his mother starving and beating him, Mr. Miner sexually molesting him, and Mrs. Miner refusing to believe him. However, he would not tell them what was on his mind. He was very puzzled by the conflicting messages he was getting from Mr. and Mrs. Miner: "She showed she cared and then she didn't." Kevin could not understand what he was doing to receive the treatment he had received in his life.

Kevin says that, as a child, he learned how to block things out of his mind. Sometimes he would lose touch with days. He states:

> I wanted to lose touch, blank out. It felt good not to think about nothing: I'd do it often – see nothing, think nothing, clouds, sky, remember nothing. If a memory popped up I'd say, "Who was that kid. I didn't know him." If it kept coming up, I'd have to get into a shower because it felt slimy.

Mrs. Miner arranged for Kevin to be psychologically (IQ) and physically (EEG and tests run on thumbs) tested within the first years of his placement in her home. In this respect she afforded him the medical treatment he needed as well as the proof for the schools that Kevin needed to be placed in a special learning class.

Mrs. Miner did not deny physically abusing the children with something other than her hand. Kevin also reported that Mrs. Miner would not grant him privacy in the bathroom. She would often come into the bathroom while Kevin was bathing. Verbal confrontations over this matter caused Kevin to run away from home. He went to an emergency shelter and reported that he was homeless.

In January 1975, Ann Mooney became the new caseworker for the Wiggins children. Ms. Mooney noted that all three children were having behavior problems in school. She wrote, "Kevin especially has difficulty as he is hyperactive." In September 1975, caseworker Elizabeth Birt noted that, "Due to Kevin's hyperactivity, Mrs. Miner has conferred with his teachers and counselor. It is shown also that his work habits and conduct were unsatisfactory."

On April 6, 1977, Department of Social Services had a critical shortage of caseworkers. Consequently, the Wiggins children were dropped from the case loads and their placement was no longer monitored. If any problems arose, Mrs. Miner was instructed to call a family service caseworker.

After the Wiggins children were dropped from their caseworker's list, problems arose. According to the DSS worker Myra Hill:

> On 9/8/77 Ms. Barbara Pryor, Service Supervisor, received a call from Family and Children's Society. It seems Kevin Wiggins, age 16, and in foster care, had been directed there and he was reporting that he was homeless.
>
> . . . According to Kevin, there had been another confrontation between him and his foster mother. As a result of this conflict, Kevin reports that he was ordered by the foster mother to leave. Kevin also informed worker that an older sister, Charlene, who had also been in the home, had left the foster home a few weeks earlier under similar confrontation.
>
> . . . Kevin had such complaints as Mrs. Miner would

> not grant him privacy in the bathroom. Kevin stated Mrs. Miner often came into the bathroom while he was bathing. Kevin was also stating that Mrs. Miner often disciplined them physically, at times with something other than her hands.
>
> According to Mrs. Miner, she had requested several months ago that these children be removed. Mrs. Miner was stating, "they were alright until they got to be teenagers." Mrs. Miner's tone of voice and attitude impressed worker as being one of demanding and dominant sergeant, and as such she would not tolerate any insubordination in her home. She asked that neither of the children be returned to her home . . . Mrs. Miner reported that she and Mr. Miner have been separated this past year.

Ms. Hill referred Kevin for a clinical evaluation on October 5, 1977. In her referral application she stated, "Kevin gives the impression of having a disoriented thinking process. Kevin also appears to have difficulty in recognizing familiar objects and/or places."

D. Ware's Home (9/19/77-1/31/78)

Prior to this placement, Kevin had stayed with Mrs. Hunter, a family friend, for approximately eight days. While at the Hunter household, Kevin had given away all of his clothing to the other children in the household. He therefore arrived at the Ware home without any clothes. Shortly after his placement with Mrs. Adeline Ware, Kevin reportedly refused to eat (claiming his throat was sore) and slept on the floor of his bedroom. He stated that he was used to sleeping on the floor. Kevin was reportedly nervous and remained somewhat isolated

from the other three foster children throughout his stay.

Kevin's caseworker noted:

> Mrs. Ware was concerned that Kevin was refusing meals prepared by Mrs. Ware. Mrs. Ware had learned that morning, from the other foster child with whom Kevin shared a room, that Kevin had been sleeping on the floor. Mrs. Ware had confronted Kevin on both issues. Kevin responded that his throat hurt too bad for him to eat, yet he refused medical attention. Kevin told Mrs. Ware that he was accustomed to sleeping on the floor.
>
> Mrs. Ware has observed some nervousness in Kevin's behavior. He remains somewhat isolated from the other children in the home.
>
> Worker saw Kevin later that day in the office. Worker tried to get Kevin to talk about these things. Kevin had seemed confused when talking to him on earlier occasions. Today Kevin's thoughts were totally disoriented. Nothing he said made sense. Worker discussed with Kevin worker's plan to do a psychological evaluation of him. Kevin was reluctantly agreeable.
>
> Kevin had learned of his sister's desire to return to the former foster home. This had put Kevin further into a frenetic state. Kevin was at the same time asking to be returned to former foster home, placed in a group home and to remain at the Ware home. Worker spoke with Mrs. Ware again on 9/28/77 at which time Mrs. Ware was puzzled by unexplainable money which

> Kevin always had in his possession. Kevin had asked Mrs. Ware that morning if he could remain in her home as long as he needed foster care.

In December 1977, Myra Hill, caseworker, stated that she believed Kevin's behavior problems were the result of a physical, emotional or mental disorder.

In January 1978, Kevin's school principal, Gorann Steele, stated that Kevin regularly came to his office: "Kevin would sometimes come in crying other times he was being somewhat hostile." Myra Hill wrote further:

> . . . At that point it was as if something clicked inside Kevin. He started to jump to his feet- Kevin then made the remark "all of you think I'm crazy." He asked if worker wanted him in Crownsville Hospital. This was followed by a period of wild excitement at which point Kevin uttered things which made little to no sense. . .
>
> Reportedly Kevin had gone to Mr. Steele's office that day to tell him that he had found a lady to adopt. Mr. Steele thought this was an unusual remark for an adolescent his age. Mr. Steele shared with worker that he admired Kevin but he hoped Kevin would not form a dependent relationship with him. *Mr. Steele was also disturbed about Kevin's almost total disorientation to reality.* (Emphasis added)
>
> Worker intended to have another psychological evaluation done as soon as possible. Another appointment is scheduled for 1-23-78 at Constant Care Program from the extreme of behavior exhibited

by Kevin, it is worker's feeling that a restricted type group placement is most appropriate at this time.

E. Hunter's Home (1/31/78-4/21/78)

Kevin lived with Mrs. Louise Hunter for approximately three months. Two of the Hunters' sons and two male boarders lived at the residence at the same time as Kevin. It was the foster care worker's impression that Mrs. Hunter was more concerned with the financial support offered to foster parents than about Kevin's well being. Mr. Hunter was not living in the home at the time; however, he did visit on occasion. During his visits, he and Mrs Hunter would engage in "drinking brawls", which according to Kevin happened more than once.

Kevin did not assume responsibilities (i.e., cleaning his bathroom) while in the Hunters' home and engaged in a verbal disagreement with Mrs. Hunter over this matter. Kevin left, the home following this argument and returned to the home of Mrs. Lenore Miner.

On April 21, 1978, Myra Hill stated that, ""Worker will continue to seek some type of supportive psychiatric services for Kevin. Kevin's behavior has appeared very erratic at times making it extremely difficult for this agency or any foster parent to plan appropriately for him."

F. Miner's Home (4/21/78-11/5/78)

Kevin returned to Mrs. Miner's home once again, as it represented the only stability he had known in his life. While at the home, Kevin "smacked" another foster care child. It was reported that he was angry with Mrs. Miner but reacted physically toward a young girl in the home.

In May 1978, Myra Hill noted:

> Kevin's school record also contained results of a psychological evaluation done on him at the University of Maryland Hospital on 2/22/75. The report contained recommendations which were never followed-up by the school system or this agency. Kevin had not had any problems with attendance until May of this year . . . Mr. McDonald and Mr. Stills, the principal, have noticed Kevin is always trying to get the attention of his peers. They have also observed that Kevin has a low self- concept.

In June 1978, Principal Steele informed Ms. Hill that Kevin was fighting in school. "Mr. Stills feels Kevin is not a delinquent child just a confused child." A school screening committee underscored Kevin's isolation from peers at school and his inability to "get along with his peers."

On August 17, 1978, Ms. Hill reported that, according to Mrs. Miner, "Kevin's uncontrollable temper and behavior had gotten him fired from his summer job." Because of his aggressive behavior with the younger children in the Miner foster home, Kevin was removed and placed in a different home.

G. Blackwell's Home (11/6/78-7/11/79)

Kevin resided in the home of Mrs. Martha Blackwell for approximately eight months. Mr. Blackwell had been bedridden for several months before Kevin's arrival and died after Kevin had been in the home for twenty one days. In addition to Kevin, there was one adopted child and six foster children in this home.

The Blackwells lived at 5010 Norwood. Ms. Blackwell's sons, Rocky and Herbert, lived there as well. Marvin, Kevin's foster brother, and Kevin were sexually molested by Rocky and Herbert. Kevin was 16 at the time. When it first happened, Rocky and Herbert called Kevin downstairs to "get high." Marvin warned him not to go down. Kevin did go downstairs and was knocked unconscious. When he woke up he was "messed up", raped. This happened to Marvin as well.

Kevin believed that Ms. Blackwell knew it was going on. She told Kevin that he would be all right. Kevin remembers being in the bathroom and he felt "like my insides were falling out." Marvin gave him some medicine for hemorrhoids to put on his wounds. Kevin couldn't hold his bowels and he couldn't walk for several days. Although Ms. Blackwell kicked her boys out of the house after this incident, they were back several days later. Vicki, another foster child, was raped by the brothers as well. Kevin stated, "They were doing everybody."

From November 1978 to June 1979, Myra Hill wrote:

> Kevin had generally made a fair adjustment to foster care. He had had six placements in foster care. Four of these placements have been within a 1 and 1/2 year period. Kevin was probably experiencing his adolescent identity crisis.
>
> . . . It seems Kevin had granted permission for the other foster boys to use his things freely, but now Kevin wanted to change his mind. Worker made h/v [emergency home visit] that afternoon. Kevin was a little more than annoyed. *Kevin's speech and reflexes were unusually slow, he had a dazed, wide-eyed expression throughout the visit* (emphasis added).

> . . . For the next few months Kevin's behavior became more deliberate and in some instances more extreme than usual. On 1/25/79, Mrs. Blackwell called to report that Kevin was not going to school since losing his job. Kevin had been deliberately violating household curfew. He was coming in the house at 11:30 p.m. Mrs. Blackwell felt his way of thinking was becoming disoriented. He has no logical explanation for any of his behavior reactions . . . Mrs. Blackwell has relayed that during periods of the night, Kevin goes outside without his shirt and shoes. The winter of 1979 was unusually cold for most of us . . . Reportedly Kevin did not pass the written entrance exam at the Army Recruitment Center.
>
> . . . On 5/15/79 received t/c [telephone call] from Mrs. Blackwell, Kevin had been arrested on 5/14/79 between 2-5 am. Reportedly Kevin had stolen some gasoline or kerosene and attempted to set fire to the front of an area carry-out shop. Afterwards he entered the store, did not find any money, so he stole some cookies. . . . Supposedly his participation in the Job Corps would dissolve any court action.

It was at this time in his life that Kevin disengaged from school. He stopped going altogether during his eleventh grade year. Kevin left the home when he was eighteen years of age and joined Job Corps in July 1979. Kevin's commitment to foster care was terminated in September 1979.

Constant Care Community Health Center staff member Lawrence Hines, MSN, conducted an evaluation of Kevin. He wrote:

> He was referred because of strange and bizarre behavior. Patient is described as being quite infantile at times and extremely hostile at others. Due to an inability to remain oriented to time, place and person, there is a history of forgetting events and causing problems in the foster home. During the psychiatric examination he was unable to do the serial seven series and his intellectual capacity was far below that of a 16 year old. He is unable to abstract or conceptualize, but there is no evidence of hallucinations or delusions. Impression: Mental retardation with cranial pathology. Suggest: Physical exam and brain scan, reeducative therapy (?head trauma).

On March 29, 1979, brain scan and C.E.F. were normal. The results of the above evaluation and brain scan were made available to DSS (Department of Social Services) on April 12, 1979.

V. JOB CORPS

Kevin was befriended by Mr. York, a Job Corps Administrator, and was subsequently sexually abused by him. Kevin states, "Every time I get close to someone, something happens." Kevin was a resident at the Woodlawn office in Baltimore for approximately two years. Mr. York was the director. Kevin did not have a home to return to during the holidays. Subsequently, he would remain at the Job Corps facility during these times. Mr. York noticed this and began to take Kevin to movies, restaurants and recreation. Kevin explains, "It was nothing weird or funny at this point." Eventually, Mr. York brought Kevin to his house after he had been drinking. He made sexual advances toward Kevin and

they became sexually involved. Kevin felt bad and Mr. York said it would not happen again, remarking "You can still be my son."

Kevin returned to Mr. York's some time later and, Kevin believes, Mr. York slipped something into his drink which made him fall asleep. Kevin woke up and knew he had been anally penetrated. Kevin believed Mr. York was sexually involved with other young men and that he was fired for these allegations. After he was fired, Mr. York continued to contact Kevin and asked him to live with him. He told Kevin that he was in love with him and begged him to live with him.

When the relationship first began, during the first two weeks, Kevin thought he might be adopted or he hoped he might. This thought "renewed my faith" for a while. However, after the sexual involvement occurred, he thought, "People are nice when they want something." He was 18 years old when he entered the Job Corps. Although he graduated after two years with a diploma in food service he could not comprehend what he read.

VI. PSYCHOLOGICAL EVALUATIONS, MENTAL RETARDATION

On October 14, 1968, Sarah T. Stram, consulting psychologist, found the following:

> Kevin is a child of borderline mental retardation. On the Stanford-Binet Scale he obtained a mental age of 5 years and 2 months, and an I.Q. of 72.

Rosario Dancel, M.D., conducted an evaluation on February 2, 1971. He concluded:

> In summary, Kevin is functioning at the upper educable or borderline retarded level with achievement scores in keeping with his general abilities. There are no physical or neurological basis found for his frequent staring. These are most likely habits and have no significance. I have spoken to Miss Johnson, the school teacher, and she feels that his hyperactivity is controllable. Diagnosis: Borderline intelligence.

On March 23, 1978, Kevin was referred to Lutheran Hospital due to strange and bizarre behavior in his foster home. He was described as being quite infantile at times and extremely hostile towards others. The psychological testing found Kevin to be mentally retarded, with chronic pathology. A brain scan was also performed at this time but found no abnormalities.

VII. POST FOSTER CARE

Following his release from Job Corps, Kevin lived with his cousin Angelo Glispy. Mr. Glispy states that Kevin worked steadily and always paid his rent on time. Mr. Glispy states that Kevin "hated his mother" and was a loner. He spent most of his money on clothes.

From 1982 to 1984, Kevin worked as a porter for a company called USF&G. From approximately 1985 to 1986, he worked security with Madison Contractors. From 1986 to 1988 he worked security for Laughlin Security, and STOP Security. In 1988, he washed dishes at the Backfin Restaurant.

During the eight years following his release from foster care, Kevin was homeless at times. He lived with a variety of

different people who befriended him on the streets.

VIII. SUMMARY CONCLUSION

From birth to age five, the most critical years of psychosoeial development, Kevin Wiggins was severely neglected and violently abused. The impact of neglect in abusive households on children has recently been examined by the U.S. Department of Justice's National Institute of Justice (NIJ) in a report titled "The Cycle of Violence".[1] The research conducted in this report found that "a study group of abused children had a 40 percent greater chance of future juvenile delinquency and adult criminality than non-abused children." A summary of the findings further stated:

> The study reaffirms the "cycle of violence" hypothesis for abused children, but also highlights the impact of neglect on future behavior. Neglect, for the purposes of the study, is defined as "extreme failure to provide adequate food, clothing, shelter, and medical attention to children."
>
> Victims of neglect are more likely to develop violent behavior than other children, the study shows. In fact, when the effects of specific types of maltreatment are measured, the neglected/abused group showed the second highest number of violent offenders. Sixteen percent of physically abused children later were arrested for a violent offense. Only five percent of those who were sexually abused were later

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[1] The Cycle of Violence, U.S. Department of Justice, National Institute of Justice, published in the National Criminal Justice Association Juvenile Justice, March 1993.

apprehended for a violent creme.

> While the NIJ study did not examine other developmental problems associated with childhood neglect, it referred to recent research that shows neglect can cause attention deficits, reduced social skills, and poor emotional stability in children. Considering that the incidence of neglect is almost three times that of physical abuse, the NIJ study suggests that far more attention needs to be devoted to families of children whose "beatings" are forms of abandonment and malnutrition.

The developmental problems cited in the above article are well-documented at every stage in Mr. Wiggins' history. Clearly, he was impaired throughout his life by the effects of neglect, abuse, abandonment and malnutrition during his most vulnerable and tender years.

Although intervention was enacted which led to Mr. Wiggins and his siblings being removed from the home, abuse persisted in the foster homes. For Mr. Wiggins, sexual molestation, rape, was the most pronounced trauma added to the list of abuses he has survived.

The profound and damaging consequences of sexual victimization have recently been well documented. In *The Universality of Incest*,[2] Lloyd Demause writes:

> The time when one could deny that sexual seduction is extremely traumatic for children appears to have

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[2] Lloyd Demause, "The Universality of Incest," The Journal of Psychohistory, Volume 19, Number 2, Fall 1991, pp. 139-140.

> ended. The more studies that come out on the effects of childhood sexual abuse, the more severe the damage is found to be. The flood of books and articles documenting the emotional problems of victims both in childhood and in later life has to be read in detail to appreciate the profound sense of betrayal and the terrifying fears felt by the child, so that even single incidents have the power to permanently ravage their lives. Severe somatic reactions, depersonalization, self- hatred, hysterical seizures, depression, borderline personality formation, promiscuity, sexual dysfunctions, suicide, self-mutilation, night terrors and flashbacks, multiple personalities, post-traumatic stress disorders, delinquency, bulimia, and the overall stunting of feelings and capacities have all been documented -- the earlier and the more often the abuse, the worse the damage.

Dr. Marie Fortune estimates that 90% of all sexual abuse victims are victimized by someone they know. Further traumatizing the horror of the situation, Dr. Fortune also states that these cases are more likely to go unreported, and thus untreated, than are those cases of abuse by a stranger. In her book, *Sexual Violence: The Unmentionable Sin*,[3] she states that sexually abused children will often develop specific coping skills, including isolation and detachment and a mistrust of adults. Additionally, the child may suffer from confusion between sex and affection, low self-esteem, and destructive behavior. A child may undergo behavioral changes in an attempt to resolve his distress. This may include regressive

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[3] Dr. Marie Marshall Fortune, *Sexual Violence The Unmentionable Sin*, Pilgrim Press, New York, 1984, pp. 163-175.

behavior, such as bed wetting, drug and alcohol abuse, and sexual play. Furthermore, delinquent behavior may ensue. Often the child is punished for these actions, rather than recognizing and treating the underlying cause, resulting in further repression of the abuse. Psychologists estimate that 88% of sexually abused adults had repressed the memory of their abuse completely for as long as 10 years, and those that did tell their story received little help or support.[4]

Kevin Wiggins bore the secrets of sexual victimization and the terror of violent abuse and neglect into his adolescence and, from there, into young adulthood. Throughout his years, evidence of the psychological damage sustained from his upbringing emerged again and again. Plainly, the horror of his violent childhood environment and the indelible trauma of sexual assault throughout his formative years, combined with borderline mental retardation, impaired his development and significantly contributed to his involvement in the present offense.

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[4] Herbert S. Strean, "Effects of Childhood Sexual Abuse on the Psychosocial Functioning of Adults," *Social Work,* September-October 1988, p, 465.

Supreme Court, U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN et al.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Judge J. William Hinkel of the Circuit Court for Baltimore County, Maryland, sitting without a jury, found Kevin Wiggins guilty of first degree murder, robbery, and two counts of theft. On direct review, the Court of Appeals of Maryland rejected Wiggins's claim that the evidence was not legally sufficient to support his murder and robbery convictions. Did the Fourth Circuit correctly determine that the Maryland Court of Appeals had not unreasonably applied clearly established federal law, as determined by this Court, in sustaining Wiggins's murder conviction?

2. Both Judge John F. Fader II of the Circuit Court for Baltimore on collateral review and the Court of Appeals of Maryland on appeal from the denial of post conviction relief rejected Wiggins's claim that sentencing counsel rendered ineffective assistance by failing to develop a mitigation case. Did the Fourth Circuit correctly determine that the Maryland Court of Appeals had not unreasonably applied clearly established federal law, as determined by this Court, in rejecting Wiggins's ineffectiveness claim?

PARTIES TO THE PROCEEDING

Wiggins names Thomas R. Corcoran and J. Joseph Curran, Jr., as Respondents. Thomas R. Corcoran was the warden of the Maryland Correctional Adjustment Center, where Wiggins is incarcerated, when the Fourth Circuit issued its decision, but he has been replaced by Sewall Smith. J. Joseph Curran, Jr., is the Attorney General for the State of Maryland.

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BRIEF IN OPPOSITION

Respondents, Warden of the Maryland Correctional Adjustment Center and the Attorney General of the State of Maryland, respectfully request that this Court deny the petition for writ of certiorari filed by Kevin Wiggins.

OPINIONS BELOW

Wiggins stands convicted of first degree murder and robbery, and for these crimes has been sentenced to death and a 10-year term of incarceration. Wiggins asks this Court to issue a writ of certiorari to review the May 2, 2002 decision of the United States Court of Appeals for the Fourth Circuit reversing the United States District Court for the District of Maryland's order granting federal habeas corpus relief and vacating Wiggins's murder conviction and death sentence.

The Fourth Circuit's published opinion, *Wiggins v. Corcoran*, 228 F.3d 629 (4th Cir. 2002), is reproduced at Pet. App. 1a-26a, and the court's order denying Wiggins's petition for rehearing and rehearing en banc is reproduced at Pet. App. 157a-158a. The published opinion of the United States District Court for the District of Maryland, *Wiggins v. Corcoran*, 164 F.Supp. 2d 538 (D. Md. 2001), granting habeas relief, is reproduced at Pet. App. 28a-89a.

The February 10, 1999 reported decision of the Court of Appeals of Maryland, *Wiggins v. State*, 352 Md. 580, 724 A.2d 1, *cert. denied*, 528 U.S. 832 (1999), affirming the denial of state post conviction relief by the Circuit Court for Baltimore County, Maryland, is reproduced at Pet. App. 92a-130a. The unpublished opinion of the Circuit Court for Baltimore County, Maryland (Fader, J.) denying state post conviction relief is reproduced in part at Pet. App. 131a-156a. The Court of Appeals' reported opinion affirming Wiggins's murder and robbery convictions and his sentence of death and term of incarceration, *Wiggins v. State*, 324 Md. 551, 597 A.2d 1359 (1991), *cert. denied*, 503 U.S. 1007 (1992), is reproduced herein at 1a-38a.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Wiggins reproduces 28 U.S.C. § 2254 at Cert. App. 159a-162a, but fails to set forth U.S. Const., Amend. VI, which provides in pertinent part that

> [i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

A. Wiggins's Trial

By indictment filed in the Circuit Court for Baltimore County in October, 1988, Wiggins was charged with the first degree murder of Florence Lacs and other offenses. J.A. 6.[1] For the murder, Maryland sought the death penalty. J.A. 1050.

The evidence introduced at Wiggins's trial was summarized as follows by the Maryland Court of Appeals on direct appeal:

> Florence Lacs, the seventy-seven-year-old murder victim, resided at the Clark Manor Apartments in Woodlawn, Maryland. On Saturday afternoon, September 17, 1988, at approximately 3:50 p.m., her dead body was found in the bathtub of her apartment. She was lying on her side, half-covered by cloudy water of a slightly greenish hue. She was fully clothed in a blue skirt, a white

[1] References herein to J.A. are to the Joint Appendix filed in the Fourth Circuit.

> blouse, and white beads. She was not wearing underpants and her skirt was pulled up to her waist in the back. No shoes were on the body, but one bedroom slipper was floating in the bathtub (its mate was lying in the hallway of her apartment).

The evidence at trial showed that on Thursday, September 15, the victim drove Mary Elgert to a luncheon. Elgert testified that the victim was then wearing a light blue skirt, white blouse, and white shoes. She said that the victim drove her home from the luncheon at 4 p.m. that day.

Edith Vassar was also in attendance at the luncheon. She testified that on the day after the luncheon, Friday, September 16, at approximately 10 a.m., the victim phoned her and they discussed an event that occurred at the luncheon the previous day.

Elizabeth Lane was present at the luncheon on September 15. She recalled driving by the victim's apartment complex the following day at 4 p.m. and noted that her car was not in the parking lot. When the victim failed to attend a scheduled card game at Lane's house on Saturday, September 17, the police were contacted at 2 p.m. and Ms. Lacs was reported missing. Lane told the police that she had last seen the victim on September 15 and that she was wearing a red dress at that time.

In the afternoon of Saturday, September 17, the apartment manager, Joseph Thiel, was alerted by the police and he entered the victim's apartment. He testified that the deadbolt lock on the door was unlocked, but that the knob lock was locked. He discovered the victim lying dead in the bathtub. The police arrived shortly thereafter. They found no evidence of forced entry into the apartment, but it had been partially ransacked. Several drawers had been removed from various locations within the living and dining rooms and were found on the floor. The night stand drawer was pulled out and its contents were in disarray.

The headboard of the bed had two built-in enclosures; they stood open and their contents were likewise in disarray. A drawer from the buffet was on the bed with items strewn all around it. The bed was mussed, with the mattress sitting askew on the box spring; the pillow cases were missing. A damp cloth was lying on the dining room table and a damp towel was lying on the victim's bed. In the kitchen, the window was slightly open but the screen was intact. The cabinets were open and some bottles of household cleaner were lying on the floor. The tap was running in the kitchen sink. In the bathroom on the sink were a spray can of insecticide, a bottle of household cleaner and a bottle of dishwashing liquid.

On the floor inside the front door of the apartment was a baseball cap which displayed a Ryder Rental Truck logo on its bill. On the coffee table in front of the sofa were two T.V. Guides, one of which was dated from September 10 to 16; the evening programs had been marked by pen through September 15; and a bookmark had been inserted at the page delineating the September 15 programs. The other T.V. Guide was for programs from September 17 to 23; it was unopened.

Seven latent fingerprints were recovered from inside the entrance door of the victim's apartment, the archway wall of the kitchen, and the doorjamb leading into the bathroom. The police also processed what appeared to be wet wipe marks on the front face of an end-table drawer found on the living room sofa. These marks, however, had no comparison value. Similar markings were observed on a cleaning bottle in the bathroom. The seven latent prints were compared to Wiggins's prints and found not to match. Two of the prints were identified as being made by one of the police officers on the scene. The other five prints were not identified.

Paramedics arrived on the scene and pronounced the victim dead at 3:50 p.m. At that time, the paramedic noted

that there was expiratory cyanosis about the victim's lips and face, that her pupils were dilated, and that her arm and jaw were rigid. She was removed from the bathtub during the evening of Saturday, September 17, in the presence of Dr. Stanley Felsenberg, the Deputy State Medical Examiner, who arrived on the scene at 9 p.m. The body was transported to the Medical Examiner's office in Baltimore, and tagged and refrigerated at approximately midnight.

Dr. Margarita Korell, Assistant State Medical Examiner, performed an autopsy on the body on the morning of September 18. She concluded that the cause of death was drowning and that the manner of death was homicide. She found a contusion on the dorsal surface of the left hand and a tiny hemorrhage in the neck area. She testified that these injuries were produced by "some external force" and were consistent with a struggle prior to the victim's death. Asked whether she could state "the minimum amount of time Ms. Lacs had been deceased," Dr. Korell responded that there was no way that she could say for certain when the victim died. She "guessed" that it could have been more or less than forty-eight hours, depending upon a number of factors. Upon objection, the court struck Dr. Korell's testimony "with respect to the time of death." It permitted in evidence, however, that Dr. Korell was unable to state, with a reasonable degree of medical certainty or probability, "what the maximum period of time was."

Chianti Thomas, age twelve at the time of trial, testified that on September 15, at approximately 4:30 or 5 p.m., she was visiting with Chantell Greenwood and Shanita Patterson at an apartment next to the victim's apartment. When they were leaving the apartment, Shanita had difficulty in locking her apartment door and sought assistance from the victim. While the victim was attempting to help lock the door, a man, later identified as

Wiggins, volunteered his assistance. When the telephone rang inside Shanita's apartment, she and Chantell went to answer it. While they were gone, Chianti heard Wiggins thank the victim for watching some sheetrock for him and heard the victim converse briefly with Wiggins. The evidence disclosed that this conversation occurred at approximately 5 or 5:30 p.m. Thereafter, the girls left the apartment building. Several weeks later, Chianti was shown photographs of six men. She selected Wiggins's photograph as the person that "looked the closest to the man that was in the building." Chianti was unable to identify Wiggins at the trial.

Robert Weinberg, a contractor, testified that he was performing work at the Clark Manor Apartments at the time of the victim's death. He said that he had employed Wiggins on September 14 and that on September 15, while Wiggins was carrying equipment from the apartment to a truck, the victim called out of her apartment window and expressed concern to Wiggins that the truck might block her car. Weinberg remembered assuring the victim that the truck did not block her car. Weinberg released Wiggins from work on September 15, sometime between 4 and 4:45 p.m. He said that approximately twenty-five to thirty-five minutes thereafter, Wiggins told him that he had moved some sheetrock from one side of the building to another, a task that Weinberg had not asked him to perform. Weinberg testified that it would have taken only two minutes for Wiggins to move the sheetrock. Weinberg also testified that Wiggins appeared for work on Friday, September 16, but left early, stating that he was being evicted that day.

The evidence disclosed that on the evening of September 15, at about 7:45 p.m., Wiggins, driving the victim's orange Chevette, went to the home of his girl friend, Geraldine Armstrong. According to her testimony, they went shopping and made several purchases, using the

victim's credit cards, which Wiggins told Armstrong belonged to his aunt. Armstrong said that she signed the victim's name to the charge slips because Wiggins said his handwriting was bad. The following day, September 16, Wiggins drove Armstrong to work in the victim's car, after which they again went shopping, using the victim's credit cards to purchase additional items, including a diamond ring at a J.C. Penney store, for which they received a certificate. Wiggins, she said, gave a false name and address for the certificate. On Saturday, September 17, Wiggins and Armstrong pawned a ring which Wiggins told Armstrong he had found in the car. The ring belonged to the victim.

On the evening of September 21, Wiggins and Armstrong were arrested by the police while driving in the victim's vehicle. At that time, Wiggins told the police that Armstrong "didn't have anything to do with this." In a statement to police, Wiggins claimed that he found the victim's car with the keys in it on a restaurant parking lot on Friday, September 16; that the credit cards were in a bag on the floor of the car; and that the ring was also found in the car. Wiggins admitted using the credit cards and pawning the ring. He stipulated with the State that he used the victim's credit cards to make several purchases on the evening of Thursday, September 15.

At the time of Wiggins's arrest, the police seized a rubber glove from a pocket in his trousers. There was no evidence of an association between the glove and the various liquids in the victim's bathroom.

The State presented testimony from Christopher Turner, who claimed to have met Wiggins during his pretrial incarceration in October, 1988. Turner, who has a history of serious mental illness and drug abuse, testified that Wiggins told him that he had stolen a car and killed the lady to whom the car belonged. Turner said that Wiggins admitted that he had kicked the lady and beaten

her, and then drowned her in the bathroom, and had put something like lye or ammonia in the water. According to Turner, Wiggins said that he had taken the lady's purse, credit cards, and some money, after which he drove away in her car. Turner also testified that Wiggins took a ring from the victim's finger; that he used the credit cards to buy clothes; and that he also permitted his girlfriend to use the credit cards.

John McElroy testified that he met Wiggins in the county detention center and that Wiggins asked him whether, at his trial, the authorities could use a hair sample against him. McElroy said that Wiggins admitted that he had hit a lady in the back of the head and put her in the bathtub of her house, drowned her, and then took $15,000 from the house. McElroy also testified that Wiggins told him that he had a girlfriend named Geraldine.

The defense presented the testimony of Gregory Kauffman, a physician with expertise in the field of forensic pathology. He testified that there was nothing in the autopsy report that made drowning seem a likely cause of the victim's death. He said that drowning seemed unlikely because the body showed no evidence of a struggle. He agreed that the manner of death was homicide. As to the time of death, Dr. Kauffman said that when the victim's body was first photographed at 9 p.m. on Saturday, September 17, she had been dead a maximum of eighteen hours. He reasoned that there were no decompositional changes at that time, which would have been evident in bodies that had been dead longer than eighteen hours. Dr. Kauffman referred especially to the inside and back of the left arm. In these areas, he said, there was lividity, or settling of the blood, and that decompositional changes occur first in areas where the blood has settled. He noted the absence of swelling or bloating, and the absence of marbling, and skin slippage. Dr. Kauffman further opined that at the time the autopsy

was performed, rigor mortis was fully developed, and that it had been broken. In this regard, he said that rigor mortis becomes fully developed around eight to twelve hours after death. Dr. Kauffman noted that the body was refrigerated at the Medical Examiner's office shortly before midnight; and he believed that, at that time, the victim had been dead twenty-one hours at the most.

Br. in Opp. App. 2a-9a. On the record before him, Judge J. William Hinkel, sitting without a jury, found Wiggins guilty of murder, robbery, and two counts of theft, saying:

> I suppose I should start by saying that there are certain things in the case that the State and the defendant need to know that I do not consider as real evidence in the case.
>
> As a fact finder, it is my responsibility to weigh all of the evidence which is available to the State and favorable to the defendant, favorable including all those reasonable inferences that can be drawn from the evidence.
>
> So you all don't wonder throughout what I am about to say, let me tell you that John McElroy is not believed by this court. I do not believe that the defendant made the statement to McElroy which McElroy atributes to the defendant. I just don't believe it.
>
> With respect to Christopher Turner, I'm persuaded even more now than I was when I ruled on the motion that he was competent to testify. As he went along, I became even more certain that he was competent to testify, but as he went along, I became more and more convinced that he was not trustworthy, and I do not believe that the defendant gave a statement to Mr. Turner confessing this crime. I do not believe his statement that Turner attributes to the defendant was, in fact, made.
>
> The evidence persuade me to these facts: That the defendant was employed at the Clark Manor apartments for the subcontractor Robert Weinberg or the Weinberg family anyway. He was there working in and around Apartment F of 1951 Woodlawn Drive. I'm persuaded

that the defendant knew who Mrs. Lacs was. I'm further persuaded that he knew that the red orange Chevette was her car.

The testimony of Chianti Thomas is not strong as a positive identification of the defendant, but when taken with the other evidence that is without any serious dispute, I'm persuaded that she saw him there, but even without Chianti Thomas's testimony or photo ID, I'm persuaded that Mr. Wiggins was at the apartment area. No one saw him in the apartment but he was seen in the hallway. Seen outside. He worked there. He was there at a relevant time.

I find also as a fact that the defendant was in possession of Mrs. Lacs' automobile and at least two of the credit card on the evening of Thursday, September 15th. This court rejects as untrue what is stated in Mr. Wiggins's written statement given to Detective Crabbs. I do not believe that he came upon that vehicle at 1 o'clock on the parking lot of Roy Rogers. That is just not so. He came into possession of that automobile and those credit cards and for that matter, the ring, on the evening of September 15th. That I find as a fact.

Now, a lot has been made over the exact time of death. I don't know the exact time of death. I am persuaded, however, from all of the evidence that the death of Mrs. Lacs did not occur sometime between 9 p.m. on September 17th and 3:00 a.m. on 9 - 17, which would be the 18 hour period that was testified to by Dr. Kauffman. I am persuaded that it occurred on Thursday the 15th of September.

The cause or the manner of death is undisputed, and I find from all of the evidence that the manner of death was homicide. I don't intend to make a finding of fact as to every piece of evidence that has been introduced, but I do believe it is important to state what other facts I find to be true.

Ms. Elgert testified that Mrs. Lacs was wearing a white

blouse and a blue skirt on Thursday. On Saturday she was wearing a white blouse and a blue skirt. That's not only in testimony. Although it was called a bluish green skirt, the photographs indicate a blue skirt, the color photographs. She either saw that on Thursday, or she predicted that the next day Mrs. Lacs would wear that same combination. I find as a fact that she was wearing it on Thursday and that Mrs. Lane was mistaken when she gave a missing person's report that it was a red dress.

I also find that the credit cards were, as I said, not found in the car but were taken from the apartment. There's ample evidence in this case to support that. The ransacking of the apartment took place at the same time that the property was taken. The credit cards were taken from the apartment as well as I am persuaded that the keys came from the apartment. That all occurred on Thursday.

We know that the car was gone, and we know that the credit cards were in the possession of the defendant on Thursday. The ransacking took place on Thursday. How the defendant entered the apartment is not known, and it makes no difference, for I'm persuaded that he entered the apartment and that he was the one who took the property.

As close as I can come to the time that it occurred is that it had to occur sometime after the defendant finished work on Thursday at the time he appeared with the automobile and credit card at the home of Geraldine Armstrong. That leaves to be explained the testimony of Ms. Vassar who says she spoke with Mrs. Lacs on Friday about 10 or 10:30 in the morning. The State, of course, vouches for its own witnesses, but I don't believe that Mrs. Vassar correctly remembers. All of the other evidence in this case is so overwhelming that it is not so.

The defendant, of course, is in possession of recently stolen property. The defense argues that any presumption that he is the robber is rebutted by the testimony of Ms. Vassar, but my decision is not based on any presumption

arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption.

I'm persuaded beyond a reasonable doubt that the defendant caused the death of Florence Lacs and that this was done wilfully, deliberately and premeditatedly. I'm further convinced beyond a reasonable doubt that the defendant committed the crime of robbery?

THE DEFENDANT: He can't tell me I did it. I'm going to go out.

THE COURT: That during the commission of the robbery, the defendant killed Florence Lacs?

THE DEFENDANT: I didn't do it. He can't tell me I did it.

THE COURT: Therefore, the verdict is guilty of the first degree and second degree counts. First count being first degree murder and the second count being robbery. I'm further convinced beyond a reasonable doubt that the defendant committed the crime of theft, the taking of the credit card and that he committed the crime of theft by taking the automobile of Mrs. Lacs; therefore, the verdict is guilty as to the fourth and fifth counts. The sixth count is also in reference to the automobile and is merged into the fifth count.

J.A. 546-51.[2]

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[2] Wiggins would have this Court believe that Geraldine Armstrong made a deal to protect herself and her brothers, *see* Cert. Pet. 2-3, 20, one of whom Wiggins says "lived in an apartment directly underneath that of the victim," Cert. Pet. 3. In so urging, Wiggins relies on evidence that was not introduced at his trial, and ignores the fact that the state courts, *see* Cert. App. 127a, have found no basis for the allegation that Geraldine Armstrong had an agreement with the state that resulted in lenient treatment.

B. Wiggins's Sentencing

Wiggins was represented at trial and at sentencing by Carl Schlaich and Michelle Nethercott. J.A. 20-1047. Respecting Wiggins's sentencing proceeding, the Maryland Court of Appeals on direct review said:

> As Wiggins elected to be sentenced by a jury, much of the testimony adduced at the trial was repeated. There were, however, some differences between the evidence offered at trial and at the sentencing proceeding.
>
> Dr. Korell told the jury that the victim died of drowning and that the manner of death was homicide. She testified that the victim sustained a contusion of the left hand and that it was a traumatic defensive-type injury. She made no mention of the hemorrhage in the victim's neck area. As to the time of death, Dr. Korell said that taking into account a number of factors, including that the body was refrigerated the entire night prior to the autopsy, she could not pinpoint the time of death. She estimated that the victim "could have died 24 or 48 hours before she was photographed at the crime scene at 9 p.m. on September 17," or earlier if, as stated by the paramedic, rigor mortis was present at 4 p.m. on that day.
>
> Dr. Ann Dixon, the Deputy Chief State Medical Examiner, testified that the victim died at least twenty-four hours before Dr. Felsenberg examined the body at the crime scene and that death could have occurred thirty-six or forty-eight hours prior to that examination, or even farther back than that.
>
> Chantell Greenwood testified that the victim was wearing a red pleated skirt and a long-sleeved white blouse when she last saw her on September 15 in the apartment hallway. She said that on that date, at approximately 5:40 p.m., she heard the victim and a painter exchange a few words in the hallway. Chianti Thomas reiterated her testimony about her visit to Shanita, the victim's neighbor,

on September 15. She told the jury that the girls had difficulty locking the door behind them; that they enlisted the help of the victim; that a man appeared on the scene at that time; and that she observed a brief exchange of words between the victim and the man she later identified as Wiggins. Thus, Chianti's trial testimony differed from her testimony at sentencing in her identification of Wiggins. Before the trial, Chianti had selected Wiggins's photograph from a group of photographs that the police had shown to her. She was, however, unable to make an in-court identification. At the sentencing hearing, however, when the prosecutor asked Chianti, "[a]nd whose picture did you pick," she made an in-court identification of Wiggins.

Dr. Silvia Camparini, an expert pathologist, testified for the defense that the body had not been dead more than twenty-four hours when Dr. Korell performed the autopsy at 9 a.m. on September 18.

In its sentencing determination, the jury concluded beyond a reasonable doubt that Wiggins was a principal in the first degree to the murder of Florence Lacs, and that one aggravating circumstance had been proven, namely, that Wiggins committed the murder in the course of robbing the victim. The jury unanimously found by a preponderance of the evidence that one mitigating circumstance existed, namely, that Wiggins had not been previously convicted of a crime of violence. An additional mitigating circumstance was found by one or more of the jurors, but fewer than all twelve, namely, Wiggins's "background." The jury unanimously found that the State proved by a preponderance of the evidence that the proven aggravating circumstance outweighed the mitigating circumstances and it imposed the death penalty.

Br. in Opp. App. 10a-11a.

C. Wiggins's Direct Appeal and State Post Conviction Proceedings

On appeal to the Court of Appeals of Maryland, Wiggins complained, inter alia, that the evidence was sufficient to establish his guilt of murder. Br. in Opp. App. 2a. In November, 1991, Maryland's high court affirmed all but Wiggins's theft convictions. Br. in Opp. App. 1a-38a. This Court subsequently denied Wiggins's petition for certiorari. *Wiggins v. Maryland*, 503 U.S. 1007 (1992).

In January, 1993, Wiggins initiated state post conviction proceedings in the Circuit Court for Baltimore County. J.A. 14. In a 257-page decision filed in October, 1997, Judge Fader denied relief. J.A. 1451-1707. In doing so, Judge Fader spent 24 pages discussing Wiggins's claim that counsel at sentencing rendered ineffective assistance by failing to develop and introduce evidence concerning Wiggins's background and mental retardation. J.A. 1680-1704. Judge Fader's decision recounts in detail the testimony of several witnesses who testified in connection with Wiggins's claim, including Carl Schlaich, one of Wiggins's counsel at sentencing; Hans Selvog, a clinical social worker who prepared a social history of Wiggins following sentencing; and Gerald Fisher, a criminal law practitioner produced by Wiggins's post conviction counsel as an expert on the issue of ineffectiveness. Cert. App. 136a-155a.

In summarizing Mr. Schlaich's testimony, Judge Fader stated in part:

> The Wiggins defense team did not have a forensic social worker to do a social history on Wiggins in preparation for sentencing. No social worker, psychologist or psychiatrist testified for Wiggins.
>
> Defense counsel Schlaich said that he had seen cases where a social worker, psychologist or psychiatrist had testified and that testimony had backfired. Through cross-examination of the witness at trial, more bad about

the defendant had been developed. He testified that on cross examination of these witnesses there were questions asked and answers given that could be construed as seeing the Defendant as a dangerous person and as giving reasons why the jury should not be merciful. There was a PSI done in this case and Schlaich supplied information to the writer of that report.

* * *

Schlaich testified that he had attended Public Defender sponsored seminars while with that office, including one that included a topic on forensic experts. He knew The National Center for Institutional Alternatives as a place he had used in the past in some cases in an attempt to establish mitigation and to find places short of incarceration with recommendations for treatment centers. He had not used them in a capital proceeding. He did not ask that the services of a forensic social worker be obtained to do a social history on the Petitioner. When questioned by post-conviction counsel concerning the holding of certain Supreme Court case names involving mitigation factors, he was uncertain of the specific holding of any of those cases. Schlaich did say that low intelligence and sexual abuse of the defendant could be mitigating circumstances in a capital case.

Trial tactics meant that Schlaich wanted to two shots at the issue of whether Wiggins was a principal in the first degree. In his opinion this was a "reasonable doubt" case on the question of time of murder and the ability of the State to place Wiggins at the scene at the time of the murder.

Cert. App. 136a-138a. (footnotes omitted). In concluding that sentencing counsel had not rendered ineffective assistance as alleged, Judge Fader looked at several other cases where counsel's performance had been challenged, including *Burger v. Kemp*, 483 U.S. 776 (1987), and *Strickland v. Washington*, 466 U.S. 668 (1984), J.A. 1699-1703, and then ruled that

[n]one of the above decisions is on a direct parallel with the facts in this case. To argue differences, is to argue differences that matter not. This court does not accept Fisher's testimony that it was error not to present information along the lines of the Selvog report. Schlaich made a tactical decision and it was reasonable. Further, Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature. Lastly, how do we know what information would have been presented by the State to contradict what was contained in Selvog's report? We have seen instances where the defense does a work-up, the State does a work-up, and the trial goes forward without either because the defense is worried about how wide the door will be opened. *Strickland* and the other cases cited have wisely told trial courts to avoid this second guessing. J.A. 1704.

The Court of Appeals of Maryland exercised its discretion to review Judge Fader's decision, and thus Wiggins's complaint that counsel provided ineffective assistance at sentencing by failing to investigate and introduce mitigation evidence about Wiggins's background and mental problems. J.A. 1710. In February, 1999, the Maryland Court of Appeals affirmed the circuit court's judgment. Pet. App. 92a-128a. This Court thereafter refused to review that judgment. *Wiggins v. Maryland*, 528 U.S. 832 (1999).

D. Proceedings on Habeas Review

Wiggins filed an application for federal habeas relief on August 6, 1999. J.A. 3, 1725-62. The application was granted on September 18, 2001, because the district court (Motz, C.J.) found that the evidence was insufficient to convict Wiggins of murder and that counsel at sentencing had rendered ineffective

assistance by failing to develop a mitigation case. Pet. App. 28a-91a. On appeal, the United States Court of Appeals for the Fourth Circuit reversed on the grounds that the state courts had not unreasonably applied clearly established federal law as determined by this Court in affirming Wiggins's murder conviction and in finding that counsel had not rendered ineffective assistance of counsel at sentencing. Pet. App. 1a-26a.

REASONS FOR DENYING THE WRIT

I.

THE MARYLAND COURT OF APPEALS' DECISION SUSTAINING WIGGINS'S MURDER CONVICTION DOES NOT INVOLVE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED PRECEDENT OF THIS COURT.

Wiggins posits that the Fourth Circuit's decision regarding the claim of insufficient evidence to support his murder conviction conflicts with *Jackson v. Virginia*, 443 U.S. 307 (1979), and decisions of other courts of appeals, and that the Fourth Circuit applied a "minimal consistency" standard that runs afoul of the standard for reviewing habeas cases under 28 U.S.C. §2254(d) announced in *Williams v. Taylor*, 529 U.S. 362 (2000). Wiggins is wrong on all counts, and so there is no need for further review of his case by this Court.

Respecting Wiggins's claim of insufficient evidence to support his murder conviction, the Maryland Court of Appeals said:

> Wiggins maintains that because his convictions rest solely upon circumstantial evidence, they cannot be sustained unless they are inconsistent with any reasonable hypothesis of innocence. For this proposition, he relies upon *Wilson v. State*, 319 Md. 530, 535-37, 573 A.2d 831

(1990) and *West v. State*, 312 Md. 197, 207-13, 539 A.2d 231 (1988). He urges that because the circumstances permit a reasonable hypothesis of his innocence of robbery and murder, the evidence is not legally sufficient to establish that he was the perpetrator of those offenses. In this regard, Wiggins postulates that a substantial number of hours intervened between the time that he came into possession of the victim's property and the time that she died. He contends that the State's evidence does not preclude the reasonable hypothesis that he entered the victim's apartment and stole her ring, car keys, and credit cards from her purse while she was attempting to help her neighbor lock her door. Wiggins suggests that he could have easily slipped into the victim's apartment and taken these items from her purse, which could have been resting just inside the door, or otherwise in plain view. He readily acknowledges that the State proved a legally sufficient case for a theft conviction, based on his subsequent possession of the victim's property and on his presence at the crime scene; but he argues that this alone does not prove that he committed robbery at the time he came into possession of the victim's property. Nor, he says, does it support an inference that he is guilty of murder, especially in view of the State's failure to establish that the victim died on September 15. As to this, Wiggins invites attention to Dr . Kauffman' s testimony that the victim did not die on September 15 but more likely on September 17. Moreover, Wiggins points to other evidence that mitigates against his guilt, namely, the testimony of the victim's two friends, one of whom testified that she received a telephone call from the victim on Friday morning, September 16, and the other who described the victim as wearing a red dress on Thursday afternoon, September 15. This evidence, according to Wiggins, highlights the State's failure to prove that the victim was dead before or at about the same time that he came into possession of her car and

other belongings on September 15.

In *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980), an appeal in a death penalty case, we stated that the standard to be applied in reviewing the sufficiency of the evidence to support a criminal conviction was "'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" *Tichnell*, 287 Md. at 717, 415 A.2d 830 (quoting *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979)). This standard does not require a court to "'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt'"; rather, the standard to apply is "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Jackson v. Virginia*, *supra*, 443 U.S. at 318-19, 99 S.Ct. at 2788-89 (emphasis in original). We recently restated this standard of review in these terms: "'[T]he constitutional standard of review is "whether after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" *Wilson v. State*, *supra*, 319 Md. at 535, 573 A.2d 831 (quoting *West v. State*, *supra*, 312 Md. at 207, 539 A.2d 231). In this regard, under Maryland Rule 8-131(c), we defer to the factual findings of the trial judge in a nonjury case, unless they are clearly erroneous, giving due regard to the opportunity of the trial judge to observe the demeanor of the witnesses and to assess their credibility. These principles of appellate review of criminal convictions are applicable in all cases, including those involving circumstantial evidence. *Wilson v. State*, *supra*, 319 Md. at 535-37, 573 A.2d 831.

Taking into account the circumstantial nature of much of the evidence against Wiggins, and considering all of the evidence in the case in a light most favorable to the State,

we conclude that Judge Hinkel, as trier of fact, rationally determined that Wiggins was the perpetrator of the offenses and that he committed the crimes on September 15. He considered but rejected Wiggins's argument that the circumstances, taken together, demonstrated a reasonable hypothesis of his innocence. By his express factual findings, as previously set forth, Judge Hinkel did not credit any of Wiggins's evidence that the robbery and murder were committed at a time subsequent to his theft of the victim's car and other personal property. That the expert witnesses were either unable to agree, or differed as to the time of death, does not render clearly erroneous Judge Hinkel's ultimate finding that Wiggins robbed and murdered the victim on September 15.

Br. in Opp. App. 11a-14a.

Where the issue is whether there was sufficient evidence to support a criminal conviction, *Jackson v. Virginia*, 443 U.S. 307 (1979), is the guiding Supreme Court precedent. *Jackson* teaches that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction . . . [is] to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Id.* at 318. "[T]his inquiry does not require a court to 'ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt.'" *Id.* at 318-19 (quoting *Woodby v. INS*, 385 U.S. 276, 282 (1966)). "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

The standard delineated in *Jackson* "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Id.* Having found a defendant guilty of the crime charged, "the factfinder's role as weigher of the evidence is preserved through a legal

conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Id.* As this Court subsequently explained in *Wright v. West*, 505 U.S. 277 (1992):

> In *Jackson*, we emphasized repeatedly the deference owed to the trier of fact and, correspondingly, the sharply limited nature of constitutional sufficiency review. We said that *"all of the evidence* is to be considered in the light most favorable to the prosecution," 443 U.S. at 319 (emphasis in original); that the prosecution need not affirmatively "rule out every hypothesis except that of guilt," *id.*, at 326; and that a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution," *id.*

Wright v. West, 505 U.S. at 296-97 (Thomas, J.) (parallel citations omitted).

In affirming Judge Hinkel's decision finding Wiggins guilty of murder, the Maryland Court of Appeals followed the dictates of *Jackson v. Virginia* and *Wright v. West*. The court did not reassess the credibility of witnesses, resolve conflicts in the testimony, or reweigh evidence. The court viewed the evidence of record in the light most favorable to the prosecution and let stand the inferences that Judge Hinkel drew from the evidence before him.

The same cannot be said of the federal district court on habeas review. This the Fourth Circuit recognized.

The evidence adduced at trial showed that Wiggins was one of the last people to see the victim alive and that he and the victim were acquainted. Wiggins had no work-related reason to remain at the apartment complex where the victim lived beyond quitting time, yet he did so and even went so far as to try and justify his presence by telling his employer that he had moved some sheetrock to the vicinity of the victim's apartment.

Wiggins also knew what car belonged to the victim, and his story about how he came into possession of the car on September 16 was obviously false. Wiggins was in possession of the victim's car and other personal property on the night of September 15, the last date that the victim marked television programs in her TV Guide.

Given the evidence and Judge Hinkel's reasoning, the Fourth Circuit properly decided "that the Maryland Court of Appeals' decision was not only at least minimally consistent with the record of facts found by the trial judge and thus was not unreasonable within the meaning of § 2254(d), it was fully supported by the record." Cert. App. 17a. In his effort to persuade this Court otherwise, Wiggins repeats the errors committed by the district court, misreads this Court's *Jackson* decision, relies in part on unreported nonprecedential lower court caselaw, and ultimately states no basis for further review of his case by this Court.

II.

THE MARYLAND COURT OF APPEALS' DECISION REJECTING WIGGINS'S CLAIM THAT SENTENCING COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY NOT DEVELOPING A CASE IN MITIGATION DOES NOT INVOLVE AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED PRECEDENT OF THIS COURT.

Wiggins would have this Court conclude that the Fourth Circuit's decision regarding the claim of ineffective assistance of sentencing counsel conflicts with *Williams v. Taylor* and the prevailing law in other circuits. What occurred in Wiggins's case is not analogous to what transpired in *Williams*, and on de novo review the Maryland Court of Appeals did not unreasonably apply *Strickland v. Washington* in affirming the

lower court's decision rejecting Wiggins's ineffectiveness claim. The Fourth Circuit's decision to like effect does not warrant further consideration by this Court.

Respecting Wiggins's claim that counsel inadequately investigated and presented mitigating evidence, the Maryland Court of Appeals said in part:

> In preparing and presenting appellant's case to the jury at sentencing, trial counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs, or at least at raising a reasonable doubt in that regard. They were, in effect, striving for "two bites at the apple." Notwithstanding that the jury would be, and was, instructed that appellant had been convicted of the crime, the jury still was required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer, and, given the entirely circumstantial nature of the State's evidence and the fact that there was some exculpatory evidence, counsel believed that appellant's best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency.
>
> Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report prepared by the Division of Parole and Probation, which included some of appellant's social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation. He was aware that the jury could regard that background as a mitigating factor. Indeed, as noted, one or more jurors did find appellant's "background" to be a mitigating factor, although not sufficient to outweigh the aggravating factor that they found. Mr. Schlaich understood that some lawyers use what he regarded as a "shotgun approach," attacking

> everything and hoping that "something sticks." He was not of that view, however, preferring to concentrate his defense. He did not, therefore, have any detailed background reports prepared, although funds may have been available for that purpose. He expressed some concern that that kind of information might prove counterproductive.

Cert. App. 121a-122a. The remainder of the state appellate court's reasoning can be found at Cert. App. 122a-127a. What bears repeating here is the following:

> Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor--the uncontested fact that appellant had not previously been convicted of a violent crime--should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant's unfortunate childhood. As Mr. Schlaich noted, the dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods.

Cert. App. 126a.

The Court of Appeals' ruling withstands scrutiny under 28 U.S.C. § 2254(d). As this Court explained in *Bell v. Cone*, 122 S. Ct. 1843, 1852 (2002), "under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." The habeas petitioner "must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.*

At Wiggins's post conviction hearing, sentencing counsel Carl Schlaich explained during direct examination that "basically what we did in mitigation was attempt to retry the factual case and try to convince a jury that the State's case on principal issue was just not there." J.A. 1191. Support for the

conclusion that the defense case at sentencing was the product of strategic planning can also be found in Mr. Schlaich's cross-examination testimony, J.A. 1199, 1219-20, and in counsel's remarks in advance of and during sentencing when seeking bifurcation of the sentencing proceeding. J.A. 555-65, 955-56, 964.

The record also amply supports the Maryland court's rejection of Wiggins's claims in that court that counsel made no effort to develop a case in mitigation and that counsel did not understand the role mitigation plays in capital cases. Mr. Schlaich's answers to questions posed by Wiggins's counsel at Wiggins's post conviction hearing are instructive in this regard:

> Q But you were aware that the public defender had hired social workers to do work-ups on social histories?
>
> A Yes.
>
> Q Like the one that is before you, PC-2 [, the Hans Selvog Report]?
>
> A Yes.
>
> * * *
>
> Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?
>
> A I believe that we tracked all of that down.
>
> Q You got the Social Service records?
>
> A That is what I recall.
>
> Q That was in the Social Service records?
>
> A Yes.
>
> Q So you knew that?
>
> A Yes.
>
> Q You also knew that there were reports of sexual abuse at one of his foster homes?
>
> A Yes.
>
> Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?
>
> A Yes.

> Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?
>
> A Yes.
>
> Q And you also knew that he was borderline mentally retarded?
>
> A Yes.
>
> Q You knew all --
>
> A At least I knew that as it was reported in other people's reports, yes.
>
> * * *
>
> Q Well, do you know at least that low intelligence can be a mitigating factor in a capital case?
>
> A Sure.
>
> Q Do you know that abusive family background can be a mitigating factor?
>
> A Yes.
>
> Q Do you know that sex abuse can be a mitigating factor in a capital case?
>
> A Yes.

J.A. 1196-99; *see also* J.A. 1214-17 (testimony regarding mitigation evidence Mr. Schlaich produced during prior representation of capital defendant Al Doering).

The Maryland Court of Appeals also reasonably rejected Wiggins's suggestion that counsel's strategy at sentencing was unreasonable. "[E]vidence of a defendant's mental impairment" or history of abuse "'may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.'" *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir.) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989)), *cert. denied sub nom. Barnes v. Netherland*, 516 U.S. 972 (1995). Here, evidence of mental impairment and a history of abuse could well have undercut the defense that Wiggins did not kill Mrs. Lacs by refuting the defense's premise, argued during closing to the jury, J.A. 1024-25, that Wiggins was not the type of person to have committed the murder. *Cf. Burger v. Kemp*, 483 U.S. at

793-95 (recognizing that evidence developed after sentencing was "by no means uniformly helpful" and that it also was "at odds" with strategy pursued).

Moreover, not only was it reasonable for counsel to not present the type of mitigating evidence that Hans Selvog produced *after* sentencing, with the benefit of hindsight, it was reasonable for counsel to have pressed the defense that they did. Counsel had a client who maintained throughout the proceedings, in both unsolicited and solicited form, that he did not murder Mrs. Lacs. J.A. 550, 573, 1038-39. Counsel had a new forensic expert for the sentencing hearing in the person of Dr. Silvia O. Comparini. J.A. 860-903. That the defense of not guilty had previously failed to persuade a single factfinder did not foreclose the possibility that one or more of the twelve new factfinders would view the evidence differently. *See* Br. in Opp. App. 33a-38a (dissenting opinion in which two members of the Court of Appeals on direct review concluded, at Br. in Opp. App. 33a, that "the evidence at the sentencing hearing was insufficient for the jury to find, beyond a reasonable doubt, that Kevin Wiggins was a principal in the first degree in the murder of Florence Lacs").

The Fourth Circuit, in finding that the Maryland Court of Appeals' decision survived scrutiny under 28 U.S.C. § 2254(d), correctly recognized that the circumstances of Wiggins's case were sufficiently dissimilar from those that obtained in *Williams v. Taylor* so as to render the result there inappropriate here. Counsel in *Williams* was faced with a client who had confessed guilt. Offering evidence in mitigation did not, therefore, require presentation of inconsistent defenses. Moreover, offering evidence in mitigation in *Williams* would have enabled counsel, who admitted an inability to do so, to come up with reasons to spare his client's life. In the case at bar, Wiggins maintained his innocence of Mrs. Lacs's murder throughout, and counsel did have credible arguments to make when arguing that the death penalty was not warranted.

Williams, of course, is not this Court's last word on

ineffectiveness claims. In *Bell v. Cone*, 122 S. Ct. at 1854, this Court reiterated that it had

> cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.

In the case at bar, Wiggins would have this Court ignore *Strickland*'s admonition. The Fourth Circuit correctly declined to do so, Cert. Pet. 23a, and, notwithstanding Wiggins's protestations to the contrary, there is no need for this Court to consider the matter further.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petitioner for writ of certiorari filed herein be denied.

Respectfully submitted,

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October, 2002

APPENDIX

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IN THE COURT OF APPEALS OF MARYLAND

No. 139

September Term, 1989

KEVIN WIGGINS

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
* Cole
Rodowsky
McAuliffe
Chasanow
Smith, Marvin H.
(retired, specially assigned),
JJ.

Opinion by Murphy, C.J.
Eldridge and Cole, JJ., dissent

Filed: November 8, 1991.

*Cole, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Art. IV, Sec. 3A, he also participated in the decision and adoption of this opinion.

Kevin Wiggins was convicted at a nonjury trial in the Circuit Court for Baltimore County (Hinkel, J.) of willful, deliberate, and premeditated murder, robbery, and two counts of theft. On October 18, 1989, following a jury sentencing hearing, Wiggins was determined to be a principal in the first degree on the murder count. He was sentenced to death in pursuance of the State's notice that it sought that penalty, as authorized by Maryland Code (1987 Repl.Vol.), Art. 27, § 412(b).

On appeal from these judgments, Wiggins maintains that he is entitled to a new trial as to his guilt of these offenses because (1) the evidence was insufficient to establish that he was the perpetrator of the crimes and (2) the trial court erred in denying his motion for a new trial. Wiggins also urges, for twelve separate reasons, that the imposition of the death penalty was improper and a new sentencing hearing is therefore required.

I.

The Trial

Florence Lacs, the seventy-seven-year-old murder victim, resided at the Clark Manor Apartments in Woodlawn, Maryland. On Saturday afternoon, September 17, 1988, at approximately 3:50 p.m., her dead body was found in the bathtub of her apartment. She was lying on her side, half-covered by cloudy water of a slightly greenish hue. She was fully clothed in a blue skirt, a white blouse, and white beads. She was not wearing underpants and her skirt was pulled up to her waist in the back. No shoes were on the body, but one bedroom slipper was floating in the bathtub (its mate was lying in the hallway of her apartment).

The evidence at trial showed that on Thursday,

September 15, the victim drove Mary Elgert to a luncheon. Elgert testified that the victim was then wearing a light blue skirt, white blouse, and white shoes. She said that the victim drove her home from the luncheon at 4 p.m. that day.

Edith Vassar was also in attendance at the luncheon. She testified that on the day after the luncheon, Friday, September 16, at approximately 10 a.m., the victim phoned her and they discussed an event that occurred at the luncheon the previous day.

Elizabeth Lane was present at the luncheon on September 15. She recalled driving by the victim's apartment complex the following day at 4 p.m. and noted that her car was not in the parking lot. When the victim failed to attend a scheduled card game at Lane's house on Saturday, September 17, the police were contacted at 2 p.m. and Ms. Lacs was reported missing. Lane told the police that she had last seen the victim on September 15 and that she was wearing a red dress at that time.

In the afternoon of Saturday, September 17, the apartment manager, Joseph Thiel, was alerted by the police and he entered the victim's apartment. He testified that the deadbolt lock on the door was unlocked, but that the knob lock was locked. He discovered the victim lying dead in the bathtub. The police arrived shortly thereafter. They found no evidence of forced entry into the apartment, but it had been partially ransacked. Several drawers had been removed from various locations within the living and dining rooms and were found on the floor. The night stand drawer was pulled out and its contents were in disarray. The headboard of the bed had two built-in enclosures; they stood open and their contents were likewise in disarray. A drawer from the buffet was on the bed with items strewn all around it. The bed was mussed, with the mattress sitting askew on the box spring; the pillow cases

were missing. A damp cloth was lying on the dining room table and a damp towel was lying on the victim's bed. In the kitchen, the window was slightly open but the screen was intact. The cabinets were open and some bottles of household cleaner were lying on the floor. The tap was running in the kitchen sink. In the bathroom on the sink were a spray can of insecticide, a bottle of household cleaner and a bottle of dishwashing liquid.

On the floor inside the front door of the apartment was a baseball cap which displayed a Ryder Rental Truck logo on its bill. On the coffee table in front of the sofa were two T.V. Guides, one of which was dated from September 10 to 16; the evening programs had been marked by pen through September 15; and a bookmark had been inserted at the page delineating the September 15 programs. The other T.V. Guide was for programs from September 17 to 23; it was unopened.

Seven latent fingerprints were recovered from inside the entrance door of the victim's apartment, the archway wall of the kitchen, and the doorjamb leading into the bathroom. The police also processed what appeared to be wet wipe marks on the front face of an end-table drawer found on the living room sofa. These marks, however, had no comparison value. Similar markings were observed on a cleaning bottle in the bathroom. The seven latent prints were compared to Wiggins's prints and found not to match. Two of the prints were identified as being made by one of the police officers on the scene. The other five prints were not identified.

Paramedics arrived on the scene and pronounced the victim dead at 3:50 p.m. At that time, the paramedic noted that there was expiratory cyanosis about the victim's lips and face, that her pupils were dilated, and that her arm and jaw were rigid. She was removed from the bathtub during the evening of Saturday, September 17, in the presence of Dr. Stanley

Felsenberg, the Deputy State Medical Examiner, who arrived on the scene at 9 p.m. The body was transported to the Medical Examiner's office in Baltimore, and tagged and refrigerated at approximately midnight.

Dr. Margarita Korell, Assistant State Medical Examiner, performed an autopsy on the body on the morning of September 18. She concluded that the cause of death was drowning and that the manner of death was homicide. She found a contusion on the dorsal surface of the left hand and a tiny hemorrhage in the neck area. She testified that these injuries were produced by "some external force" and were consistent with a struggle prior to the victim's death. Asked whether she could state "the minimum amount of time Ms. Lacs had been deceased," Dr. Korell responded that there was no way that she could say for certain when the victim died. She "guessed" that it could have been more or less than forty-eight hours, depending upon a number of factors. Upon objection, the court struck Dr. Korell's testimony "with respect to the time of death." It permitted in evidence, however, that Dr. Korell was unable to state, with a reasonable degree of medical certainty or probability, "what the maximum period of time was."

Chianti Thomas, age twelve at the time of trial, testified that on September 15, at approximately 4:30 or 5 p.m., she was visiting with Chantell Greenwood and Shanita Patterson at an apartment next to the victim's apartment. When they were leaving the apartment, Shanita had difficulty in locking her apartment door and sought assistance from the victim. While the victim was attempting to help lock the door, a man, later identified as Wiggins, volunteered his assistance. When the telephone rang inside Shanita's apartment, she and Chantell went to answer it. While they were gone, Chianti heard Wiggins thank the victim for watching some sheetrock for him and heard the victim converse briefly with Wiggins. The

evidence disclosed that this conversation occurred at approximately 5 or 5:30 p.m. Thereafter, the girls left the apartment building. Several weeks later, Chianti was shown photographs of six men. She selected Wiggins's photograph as the person that "looked the closest to the man that was in the building." Chianti was unable to identify Wiggins at the trial.

Robert Weinberg, a contractor, testified that he was performing work at the Clark Manor Apartments at the time of the victim's death. He said that he had employed Wiggins on September 14 and that on September 15, while Wiggins was carrying equipment from the apartment to a truck, the victim called out of her apartment window and expressed concern to Wiggins that the truck might block her car. Weinberg remembered assuring the victim that the truck did not block her car. Weinberg released Wiggins from work on September 15, sometime between 4 and 4:45 p.m. He said that approximately twenty-five to thirty-five minutes thereafter, Wiggins told him that he had moved some sheetrock from one side of the building to another, a task that Weinberg had not asked him to perform. Weinberg testified that it would have taken only two minutes for Wiggins to move the sheetrock. Weinberg also testified that Wiggins appeared for work on Friday, September 16, but left early, stating that he was being evicted that day.

The evidence disclosed that on the evening of September 15, at about 7:45 p.m., Wiggins, driving the victim's orange Chevette, went to the home of his girl friend, Geraldine Armstrong. According to her testimony, they went shopping and made several purchases, using the victim's credit cards, which Wiggins told Armstrong belonged to his aunt. Armstrong said that she signed the victim's name to the charge slips because Wiggins said his handwriting was bad. The following day, September 16, Wiggins drove Armstrong to work in the victim's car, after which they again went shopping, using the victim's credit cards to purchase additional items,

including a diamond ring at a J.C. Penney store, for which they received a certificate. Wiggins, she said, gave a false name and address for the certificate. On Saturday, September 17, Wiggins and Armstrong pawned a ring which Wiggins told Armstrong he had found in the car. The ring belonged to the victim.

On the evening of September 21, Wiggins and Armstrong were arrested by the police while driving in the victim's vehicle. At that time, Wiggins told the police that Armstrong "didn't have anything to do with this." In a statement to police, Wiggins claimed that he found the victim's car with the keys in it on a restaurant parking lot on Friday, September 16; that the credit cards were in a bag on the floor of the car; and that the ring was also found in the car. Wiggins admitted using the credit cards and pawning the ring. He stipulated with the State that he used the victim's credit cards to make several purchases on the evening of Thursday, September 15.

At the time of Wiggins's arrest, the police seized a rubber glove from a pocket in his trousers. There was no evidence of an association between the glove and the various liquids in the victim's bathroom.

The State presented testimony from Christopher Turner, who claimed to have met Wiggins during his pretrial incarceration in October, 1988. Turner, who has a history of serious mental illness and drug abuse, testified that Wiggins told him that he had stolen a car and killed the lady to whom the car belonged. Turner said that Wiggins admitted that he had kicked the lady and beaten her, and then drowned her in the bathroom, and had put something like lye or ammonia in the water. According to Turner, Wiggins said that he had taken the lady's purse, credit cards, and some money, after which he drove away in her car. Turner also testified that Wiggins took

a ring from the victim's finger; that he used the credit cards to buy clothes; and that he also permitted his girlfriend to use the credit cards.

John McElroy testified that he met Wiggins in the county detention center and that Wiggins asked him whether, at his trial, the authorities could use a hair sample against him. McElroy said that Wiggins admitted that he had hit a lady in the back of the head and put her in the bathtub of her house, drowned her, and then took $15,000 from the house. McElroy also testified that Wiggins told him that he had a girlfriend named Geraldine.

The defense presented the testimony of Gregory Kauffman, a physician with expertise in the field of forensic pathology. He testified that there was nothing in the autopsy report that made drowning seem a likely cause of the victim's death. He said that drowning seemed unlikely because the body showed no evidence of a struggle. He agreed that the manner of death was homicide. As to the time of death, Dr. Kauffman said that when the victim's body was first photographed at 9 p.m. on Saturday, September 17, she had been dead a maximum of eighteen hours. He reasoned that there were no decompositional changes at that time, which would have been evident in bodies that had been dead longer than eighteen hours. Dr. Kauffman referred especially to the inside and back of the left arm. In these areas, he said, there was lividity, or settling of the blood, and that decompositional changes occur first in areas where the blood has settled. He noted the absence of swelling or bloating, and the absence of marbling, and skin slippage. Dr. Kauffman further opined that at the time the autopsy was performed, rigor mortis was fully developed, and that it had been broken. In this regard, he said that rigor mortis becomes fully developed around eight to twelve hours after death. Dr. Kauffman noted that the body was refrigerated at the Medical Examiner's office shortly

before midnight; and he believed that, at that time, the victim had been dead twenty-one hours at the most.

After hearing all of the evidence, Judge Hinkel found Wiggins guilty of first- degree murder, robbery, and theft. He found as a fact that Wiggins worked at the Clark Manor Apartment complex and knew the victim and which car she owned. He further found that it was Wiggins that Chianti Thomas saw outside of the victim's apartment on September 15, and that Wiggins was in possession of the victim's automobile, credit cards, and ring later on that day. He concluded that the ransacking of the victim's apartment took place on September 15, between the time that Wiggins was released from work and the time that he arrived at the home of Geraldine Armstrong in the victim's car. The court disbelieved Wiggins's statement to the police that he found the car in a restaurant parking lot on September 16. It found as a fact that the credit cards and car keys were taken from the apartment after it had been ransacked.

Judge Hinkel determined that Ms. Vassar was mistaken when she said that she had spoken to the victim on the morning of September 16, and that Ms. Elgert was mistaken when she told the police that the victim was wearing a red dress on Thursday, September 15. The court believed that the victim was wearing a blue skirt and white blouse on that day, this being the clothes she was wearing when she was found in the bathtub. The court did not credit Dr. Gregory Kauffman's testimony as to the time of death; rather, it was persuaded that Wiggins murdered the victim on September 15 and that the killing was done willfully, deliberately, and with premeditation and in the course of a robbery. In so concluding, Judge Hinkel stated that he did not believe the testimony of either John McElroy or Christopher Turner, each of whom claimed that Wiggins admitted murdering and robbing the victim.

II.

The Sentencing Proceeding

As Wiggins elected to be sentenced by a jury, much of the testimony adduced at the trial was repeated. There were, however, some differences between the evidence offered at trial and at the sentencing proceeding.

Dr. Korell told the jury that the victim died of drowning and that the manner of death was homicide. She testified that the victim sustained a contusion of the left hand and that it was a traumatic defensive-type injury. She made no mention of the hemorrhage in the victim's neck area. As to the time of death, Dr. Korell said that taking into account a number of factors, including that the body was refrigerated the entire night prior to the autopsy, she could not pinpoint the time of death. She estimated that the victim "could have died 24 or 48 hours before she was photographed at the crime scene at 9 p.m. on September 17," or earlier if, as stated by the paramedic, rigor mortis was present at 4 p.m. on that day.

Dr. Ann Dixon, the Deputy Chief State Medical Examiner, testified that the victim died at least twenty-four hours before Dr. Felsenberg examined the body at the crime scene and that death could have occurred thirty-six or forty-eight hours prior to that examination, or even farther back than that.

Chantell Greenwood testified that the victim was wearing a red pleated skirt and a long-sleeved white blouse when she last saw her on September 15 in the apartment hallway. She said that on that date, at approximately 5:40 p.m., she heard the victim and a painter exchange a few words in the hallway. Chianti Thomas reiterated her testimony about her visit to Shanita, the victim's neighbor, on September 15. She

told the jury that the girls had difficulty locking the door behind them; that they enlisted the help of the victim; that a man appeared on the scene at that time; and that she observed a brief exchange of words between the victim and the man she later identified as Wiggins. Thus, Chianti's trial testimony differed from her testimony at sentencing in her identification of Wiggins. Before the trial, Chianti had selected Wiggins's photograph from a group of photographs that the police had shown to her. She was, however, unable to make an in-court identification. At the sentencing hearing, however, when the prosecutor asked Chianti, "[a]nd whose picture did you pick," she made an in-court identification of Wiggins.

Dr. Silvia Camparini, an expert pathologist, testified for the defense that the body had not been dead more than twenty-four hours when Dr. Korell performed the autopsy at 9 a.m. on September 18.

In its sentencing determination, the jury concluded beyond a reasonable doubt that Wiggins was a principal in the first degree to the murder of Florence Lacs, and that one aggravating circumstance had been proven, namely, that Wiggins committed the murder in the course of robbing the victim. The jury unanimously found by a preponderance of the evidence that one mitigating circumstance existed, namely, that Wiggins had not been previously convicted of a crime of violence. An additional mitigating circumstance was found by one or more of the jurors, but fewer than all twelve, namely, Wiggins's "background." The jury unanimously found that the State proved by a preponderance of the evidence that the proven aggravating circumstance outweighed the mitigating circumstances and it imposed the death penalty.

III.

Wiggins maintains that because his convictions rest

solely upon circumstantial evidence, they cannot be sustained unless they are inconsistent with any reasonable hypothesis of innocence. For this proposition, he relies upon Wilson v. State, 319 Md. 530, 535-37, 573 A.2d 831 (1990) and West v. State, 312 Md. 197, 207-13, 539 A.2d 231 (1988). He urges that because the circumstances permit a reasonable hypothesis of his innocence of robbery and murder, the evidence is not legally sufficient to establish that he was the perpetrator of those offenses. In this regard, Wiggins postulates that a substantial number of hours intervened between the time that he came into possession of the victim's property and the time that she died. He contends that the State's evidence does not preclude the reasonable hypothesis that he entered the victim's apartment and stole her ring, car keys, and credit cards from her purse while she was attempting to help her neighbor lock her door. Wiggins suggests that he could have easily slipped into the victim's apartment and taken these items from her purse, which could have been resting just inside the door, or otherwise in plain view. He readily acknowledges that the State proved a legally sufficient case for a theft conviction, based on his subsequent possession of the victim's property and on his presence at the crime scene; but he argues that this alone does not prove that he committed robbery at the time he came into possession of the victim's property. Nor, he says, does it support an inference that he is guilty of murder, especially in view of the State's failure to establish that the victim died on September 15. As to this, Wiggins invites attention to Dr. Kauffman's testimony that the victim did not die on September 15 but more likely on September 17. Moreover, Wiggins points to other evidence that mitigates against his guilt, namely, the testimony of the victim's two friends, one of whom testified that she received a telephone call from the victim on Friday morning, September 16, and the other who described the victim as wearing a red dress on Thursday afternoon, September 15. This evidence, according to Wiggins, highlights the State's failure to prove that the victim was dead before or at about the

same time that he came into possession of her car and other belongings on September 15.

In Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980), an appeal in a death penalty case, we stated that the standard to be applied in reviewing the sufficiency of the evidence to support a criminal conviction was " 'whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.'" Tichnell, 287 Md. at 717 (quoting Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). This standard does not require a court to "'ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt'"; rather, the standard to apply is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Jackson v. Virginia, supra, 443 U.S. at 318-19 (emphasis in original). We recently restated this standard of review in these terms: "'[T]he constitutional standard of review is "whether after considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'" Wilson v. State, supra, 319 Md. at 535 (quoting West v. State, supra, 312 Md. at 207). In this regard, under Maryland Rule 8-131(c), we defer to the factual findings of the trial judge in a nonjury case, unless they are clearly erroneous, giving due regard to the opportunity of the trial judge to observe the demeanor of the witnesses and to assess their credibility. These principles of appellate review of criminal convictions are applicable in all cases, including those involving circumstantial evidence. Wilson v. State, supra, 319 Md. at 535-37.

Taking into account the circumstantial nature of much of the evidence against Wiggins, and considering all of the evidence in the case in a light most favorable to the State, we

conclude that Judge Hinkel, as trier of fact, rationally determined that Wiggins was the perpetrator of the offenses and that he committed the crimes on September 15. He considered but rejected Wiggins's argument that the circumstances, taken together, demonstrated a reasonable hypothesis of his innocence. By his express factual findings, as previously set forth, Judge Hinkel did not credit any of Wiggins's evidence that the robbery and murder were committed at a time subsequent to his theft of the victim's car and other personal property. That the expert witnesses were either unable to agree, or differed as to the time of death, does not render clearly erroneous Judge Hinkel's ultimate finding that Wiggins robbed and murdered the victim on September 15.

IV.

Wiggins contends that the trial court erred in denying his motion for a new trial. He points out that evidence was adduced at the hearing on the motion which disclosed that prior to trial Dr. Korell told defense counsel that the victim died from four to ten hours before her body was discovered on September 17, and that the outside limit was twenty-four hours. The evidence also showed that two days later, after Dr. Korell had conferred with Dr. Ann Dixon, the Deputy State Chief Medical Examiner, she told defense counsel that her opinion had changed and that the time of death could have been forty-eight hours before the body was discovered.

Wiggins notes that at the trial Dr. Korell testified that she was unable, with reasonable medical certainty, to establish the time of death. Wiggins next notes that Dr. Korell testified at the sentencing hearing that the victim had been dead twenty-four to forty-eight hours prior to 9 p.m. on September 17.

On the basis of this evidence, Wiggins argues that Dr.

Korell's expert opinion at the sentencing hearing was newly discovered evidence within the contemplation of Maryland Rule 4-331(c), justifying the award of a new trial. He claims that this opinion was clearly material and would have produced an acquittal since the outside limit of her range established that the victim was alive after he came into possession of her property. According to Wiggins, had this testimony been introduced at the trial, it would have been consistent with the defense expert's opinion as to the time of death and would have exonerated Wiggins from guilt. In other words, Wiggins says that had the evidence at trial included Dr. Korell's revised opinion, all of the medical evidence introduced at the trial would have been consistent only with his innocence.

In a similar vein, Wiggins argues that Dr. Korell's "shifting opinions on the time of death" denied him a fair trial. He says that "matters would have been different" if Dr. Korell's opinion at trial had been consistent with her opinion at the sentencing hearing.

Assuming, arguendo, that Dr. Korell's testimony at the sentencing hearing amounted to newly discovered evidence, the standard for determining whether a new trial should be granted based upon that evidence is whether it may have produced a different result, i.e., that "there was a substantial or significant possibility that the verdict of the trier of fact would have been affected." See Yorke v. State, 315 Md. 578, 588, 556 A.2d 230 (1989).

As earlier indicated, in rendering his verdict at the trial, Judge Hinkel stated:

> "Now, a lot has been made over the exact time of death. I don't know the exact time of death. I am persuaded, however, from all the evidence that the death of Mrs. Lacs did not occur

> sometime between 9 p.m. on September 17th and 3:00 a.m. on 9-17, which would be the 18 hour period that was testified to by Dr. Kauffman. I am persuaded that it occurred on Thursday the fifteenth of September."

In denying the motion for a new trial, the Judge Hinkel stated:

> "But there's so many other facts in this case and there's nothing certain about medical testimony of this sort. The state and the defense knew that the medical profession is not equipped or prepared to state with any degree of certainty, not even probability, it appears, as to matters of this nature. But all the other evidence in this case certainly was sufficient for me, at the guilt/innocence stage, and for the jury in the sentencing phase, to determine that Mr. Wiggins was a principal in the first degree."

It is thus readily apparent that the trial judge did not rely upon Dr. Korell's trial testimony with respect to the time of death. Indeed, her estimate given at the trial, which she characterized as a "guess," was that the victim could have been dead more or less than forty-eight hours when her body was discovered. This testimony, upon Wiggins's objection, was stricken and thus not considered at the trial.

In denying Wiggins's new trial motion, Judge Hinkel recognized that expert testimony as to the time of death was uncertain and that Wiggins was aware of this fact. Judge Hinkel, as trier of fact, concluded that the claimed newly discovered evidence would not have produced a different result. In this regard, we note that, at the sentencing hearing, Dr. Korell's testimony was that Ms. Lacs could have been dead twenty-four to forty-eight hours prior to 9 p.m. on September

17 when she was photographed in the bathtub, or even earlier on that day. Thus, her revised opinion, if introduced at the trial, would have actually buttressed the State's case. We hold that Judge Hinkel did not abuse his discretion in denying the new trial motion.

Nor is there merit in Wiggins's claim that he should be granted a new trial because Dr. Korell's changing testimony rendered the trial fundamentally unfair. As the trial court noted, and the record indicates, medical testimony regarding time of death is fraught with uncertainty. Wiggins was aware that Dr. Korell changed her opinion once prior to the trial, and the defense had ample time to, and did, secure its own qualified expert testimony on this matter. As the ambivalence of the State's expert witness was known to the defense, her opinion at the sentencing hearing did not deprive Wiggins of a fair trial. Accordingly, we find no merit in this argument.

V.

Wiggins argues that he cannot be sentenced to death because under Maryland Code (1987 Repl.Vol.), Art. 27, § 413(e)(1), the State failed to prove beyond a reasonable doubt that he was a principal in the first degree. In response, the State maintains that the evidence does not disclose the existence of a second person in the commission of the crimes, and therefore the jury properly concluded that Wiggins was a principal in the first degree.

As we said in Stebbing v. State, 299 Md. 331, 371, 473 A.2d 903 (1984), eligibility for the death sentence is confined to persons convicted of first degree murder as a principal in the first degree, namely, by one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent. Johnson v. State, 303 Md. 487, 510,

495 A.2d 1 (1985).[1]

As already indicated, there was evidence which showed that Wiggins was present near the victim's apartment at the approximate time of the crimes. The manner of the victim's death was homicide, and the circumstances plainly demonstrated that the murder was premeditated. Under the circumstances disclosed in the evidence, Wiggins's possession of the victim's property shortly after she was robbed and murdered support an inference that he was the perpetrator of both the robbery and the murder.

There was no evidence that Wiggins was seen in company with another person at the time of the offenses. In this regard, Wiggins's employer indicated that he had released Wiggins from work at approximately 4:45 p.m., and that Wiggins returned some twenty minutes later, reporting that he had moved some sheetrock. As before, Wiggins was alone. Shortly thereafter, when Wiggins arrived at his girlfriend's home, driving the victim's car, he was again alone. There was no other individual present, according to the evidence, during the three-day period over which Wiggins and his girlfriend used the victim's credit cards to acquire various items of property.

We have considered Wiggins's arguments suggesting the presence of a second perpetrator because of the unidentified fingerprints found at the crime scene, as well as the Ryder Rental Truck hat that was found on the floor just inside the apartment door. As to the unidentified fingerprints, the State's

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[1] A statutory exception to the perpetrator requirement in death penalty cases is the provision that one who employs another to kill is also a first degree principal. See Art. 27, § 413 (d) (7) and § 413 (e) (1).

failure, after investigation, to ascertain the identity of these prints does not support the existence of a second participant. In this regard, the fingerprint experts were uncertain that the unidentified prints were not those of the victim, inasmuch as the prints taken from her body were of such poor quality. We view this evidence as wholly inconclusive and not supportive of a reasonable hypothesis that Wiggins may have acted in concert with another person.

As to the hat, the police examined it for hair and fibers but found only a few small lint fibers on its inside rim. The police took the hat to two stores to see if they sold that type of hat and found that neither did. At most, this evidence showed that the State, after investigation, was unable to prove that Wiggins owned the hat or that it belonged to someone else. This evidence does not support a reasonable hypothesis that another individual was present in the victim's apartment at the time of the crimes and that it was that other person, and not himself, who actually killed the victim. Accordingly, we find no error in the jury's finding that Wiggins was a principal in the first degree.

VI.

Prior to sentencing, the State moved in limine to exclude evidence of its offer of a life sentence in exchange for a guilty plea. Wiggins had indicated an intention to introduce evidence of this offer during the sentencing hearing. The court ruled that while the offer, if admitted in evidence, would "mitigate[ ] in favor of the defendant," it was not admissible before the sentencing authority as it would seriously cripple the plea negotiation process in capital sentencing prosecutions.

Wiggins argues that the State's plea offer was properly admissible as mitigating evidence because, under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the

sentencing authority in capital cases must be permitted to consider any relevant mitigating factor, i.e., anything that might serve as a basis for a sentence less than death. Specifically, Wiggins says that the State's offer, for whatever reason it was made, demonstrated its belief that a life sentence was appropriate in the case and had this been known to the sentencing jury it would not have imposed the death sentence.

In Lockett, 438 U.S. at 605, the Supreme Court held that

> "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

(Emphasis in original; footnotes omitted.) Nothing in Lockett, the Court said, "limits the traditional authority of the court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 605, n. 12, quoted in Johnson, supra, 303 Md. at 527-28.

We have said that the appropriateness of sentences other than death may be considered by the sentencer as a mitigating circumstance in a capital prosecution. See Hunt v. State, 321 Md. 387, 404, 583 A.2d 218 (1990); Doering v. State, 313 Md. 384, 545 A.2d 1281 (1988); Harris v. State, 312 Md. 225, 539 A.2d 637 (1988). In Hunt, the defendant did not seek timely admission of evidence of his sentence for a handgun offense, and his request to reopen his case to offer it was denied by the trial judge. We held that the evidence would have been admissible in Hunt's case-in-chief, as evidence that "would aid

the jury in assessing the legal and practical effect of a sentence less than death," 321 Md. at 404, but that the trial judge did not abuse his discretion in denying the request to reopen. In Harris, we held that evidence of the sentences imposed on the defendant for a related robbery offense, where the robbery was the statutory aggravating factor in a capital sentencing proceeding, was admissible. We reasoned that the sentencer might consider, as a mitigating factor, the fact that the defendant had already been appropriately sentenced for that crime. In Doering, we held that a defendant in a capital sentencing proceeding may introduce relevant and competent information regarding his eligibility for parole in the event a life sentence is imposed. We explained that the sentencer, in seeking to determine the appropriateness of a life sentence, would be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence may be considered as a relevant mitigating circumstance. Doering, 313 Md. at 412. In these three cases, the factors with the potential to mitigate were related to the actual amount of time the defendant was likely to spend in prison in the event that the jury elected to impose a life sentence; consequently, they constituted relevant information for the jury to consider in determining the appropriate disposition.

Evidence of a plea offer, on the other hand, is not an appropriate factor to aid the jury in making its determination. As Wiggins concedes, the State may have sought a guilty plea to avoid the possibility of an acquittal in a case which involved largely circumstantial evidence. This prosecutorial concern would not, therefore, necessarily indicate that the State considered a life sentence to be the appropriate punishment for Wiggins's crimes. In other words, as the State suggests, its plea offer did not reflect on either the crime or the character of the defendant; rather, it resulted after the State evaluated the strength of its case and the concern that it had that the jury

might not return a guilty verdict. Thus, the evidence of the plea offer did not bear on the defendant's character, prior record, or the circumstances of the crime, and was not relevant mitigating evidence. See Calhoun v. State, 297 Md. 563, 468 A.2d 45 (1983).

VII.

Wiggins next contends that the trial court erred in excluding from the consideration of the sentencing jury, as relevant mitigating evidence, a three-volume collection of documents detailing potentially capital cases where a sentence less than death was imposed. He draws attention to Art. 27, § 414(e)(4), which requires this Court in every case where the death sentence has been imposed to compare it to those imposed "in similar cases" to insure that it is not excessive or disproportionate, "considering both the crime and the defendant." Wiggins claims that sentence proportionality is an appropriate consideration for the sentencing authority as well, and that the proffered evidence should have been admitted for its consideration. He claims that, lacking this information, the sentencing jury did not have relevant information to make its sentencing decision--information which, he says, is traditionally relevant in determining the appropriate sentence and which would have assisted a jury in determining the weight to be given to aggravating factors in weighing them against mitigating circumstances. In this regard, Wiggins says that had the jury known of the frequency with which life imprisonment is imposed in murder cases of a more extreme nature than his own, it might well have determined to return a sentence less than death.

In White v. State, 322 Md. 738, 589 A.2d 969 (1991), we noted that proportionality review in capital sentencing cases under Art. 27, § 414(e)(4) requires the review to be conducted by this Court and not by the sentencing authority. We further

noted that there is no federal constitutional requirement of proportionality review in death penalty cases, citing Pulley v. Harris, 465 U.S. 37, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). While we recognized that evidence proffered by a defendant to establish the existence of a mitigating circumstance should be generously viewed by the sentencer, we also said that mitigating circumstances are "defendant specific" and "incident specific" and that ordinarily the findings regarding another person do not in any way tend to establish a material fact beneficial to an entirely different individual. White, supra, 322 Md. at 750; Johnson v. State, supra, 303 Md. at 528-29. For like reasons, we also find no merit in Wiggins's further argument that the trial court erred in excluding from evidence a law review article chronicling a study which, according to the author, uncovered 350 cases in which a miscarriage of justice occurred in a potentially capital case.

VIII.

Wiggins maintains that his right of allocution before the sentencing jury was unduly restricted. Particularly, he argues that after all of the evidence had been presented to the sentencing authority, but before the court had given its instruction to the jury, he sought to show, in allocution before the jury, that he had been offered a life sentence in exchange for a guilty plea but had rejected the State's offer. In denying the request, the court noted that allocution "is considered evidence in the case for the purposes of the jury determining what the sentence ought to be ... although that evidence is not given ... under oath." The court restricted Wiggins's right of allocution for the same reasons which caused it to exclude the same evidence at the sentencing hearing.

Wiggins argues that under Harris v. State, 306 Md. 344, 509 A.2d 120 (1986), he should have been permitted to

allocute as he had requested. He claims that the substance of the intended allocution was relevant because under Harris, id. at 351, "allocution, unlike closing argument, is not limited to the record in the case, inferences from material in the record, and matters of common human experience."

Although the custom predates the Maryland Rules, the right of allocution is now provided to a defendant in a capital case by Maryland Rule 4-343(d). The Rule provides, in pertinent part, that "[b]efore sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement." In Harris, 306 Md. at 359, we said that a defendant who timely asserts his right to allocute, and who provides an acceptable proffer, must be afforded a fair opportunity to exercise this right. We did not, however, circumscribe the broad and traditional discretion of trial judges over the conduct of a criminal trial; rather, we recognized that the trial court could, in its discretion, curtail "allocution that is irrelevant or unreasonably protracted." Id. at 359. We conclude, for reasons earlier stated, that the State's offer of a plea agreement was not a proper matter of consideration for the jury in deciding the appropriateness of a death sentence.

IX.

Wiggins next urges that the trial court erred in denying his motion for a bifurcated sentencing hearing. In this regard, he moved that the sentencing proceeding be bifurcated by the court so that the jury could first decide whether he was a principal in the first degree and, if that issue was found in the affirmative, a separate proceeding should then be held to determine whether the aggravating circumstances outweighed the mitigating circumstances and death was the appropriate penalty. According to Wiggins, this is a fair and equitable solution to problems "which arise from deciding, at the

sentencing proceeding, both the issue of first degree principal and the appropriate penalty." Without bifurcation, Wiggins argues that "there will be not only overlays and confusion but also the inevitable result that the jury, in deciding whether the defendant is eligible for the death penalty, will consider evidence prejudicial to the issue of guilt or innocence as a first degree principal, i.e., evidence the admission of which at a trial would be reversible error." Wiggins maintains that neither the death penalty statute, nor the implementing rules of this Court, prohibit bifurcation and that, in fact, they are consistent with bifurcation of the sentencing proceeding.

In response, the State maintains that, in effect, Wiggins seeks to have the sentencing jury first reconsider his guilt "under the guise of a principal in the first degree determination (after the court had convicted him of murder) without the jury's proper role of 'sentencer' being evident."

According to the State, nothing in the capital sentencing statute, Art. 27, § 413(a) , requires a separate sentencing proceeding to determine the punishment, nor is it required by the statute or the federal constitution that any component part of the sentencing determination be determined in a separate proceeding. See McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). The State points out that Maryland Rule 4-343(e) prescribes the form for jury deliberation of sentence in a capital case. That form places before the jury, simultaneously, the issues of principal in the first degree, mitigating and aggravating circumstances, and the ultimate determination. Rule 4-343(f) delineates circumstances under which the form, in less than its entirety, may be submitted to the jury. Nothing in the rule, however, mandates a bifurcated hearing and we perceive no error in the trial court's refusal to order bifurcation. See Hunt v. State, supra; State v. Colvin, 314 Md. 1, 548 A.2d 506 (1988). But even assuming, arguendo, the existence of inherent discretion in the trial court

to bifurcate the proceeding, no abuse of discretion would have resulted from the denial of the bifurcation request.

X.

Wiggins next claims that the trial judge, during the sentencing hearing, committed reversible error when he admitted evidence relating to a T.V. Guide book found in the victim's apartment at the time her body was discovered. Specifically, he claims that testimony by a police officer described a T.V. Guide magazine with markings on all of the pages through the date that the victim was last seen alive, but not thereafter. Wiggins asserts that this testimony was irrelevant and prejudicial. He argues that it had no probative value, because no witness testified regarding the victim's habit of marking T.V. Guide magazines. Therefore, he says, it is not known when these marks were made, why they were made, or even by whom they were made.

In State v. Joyner, 314 Md. 113, 119, 549 A.2d 380 (1988), we applied the test which governs the admissibility of evidence in a criminal case. We noted that there are two important components of relevant evidence: materiality and probative value. Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case. Probative value is the tendency of evidence to establish the proposition that it is offered to prove. Evidence which is not probative of the proposition at which it is directed is irrelevant. Id. at 119. Thus, to be of probative value, evidence must only have a tendency to prove the fact at issue; it need not establish the fact conclusively or be beyond doubt.

A daily pattern of marking each day's television programs was reflected in the magazine, and it ceased as of the time the victim was last seen alive. While it is theoretically possible that someone other than the victim made the marks, or

that they were made randomly, or were all made on one day, these possibilities do not circumscribe the relevance and admissibility of the evidence. The victim lived alone, and the factfinder could infer that the markings were made on a day-to-day basis, in a contemporaneous fashion, consistent with the victim's daily television viewing selections. We think that the date on which the markings ceased had a tendency to prove that the victim died on September 15 and, therefore, the evidence was properly admitted.

XI.

Wiggins further complains that testimony by one of the victim's friends, Mary Elgert, constituted victim impact evidence which was inadmissible under Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). Specifically, Ms. Elgert testified that the victim was "a very happy-go-lucky person" who was "always thinking of something interesting."

We think it clear that Ms. Elgert's testimony could in no event be deemed victim impact evidence under the Court's decision in Booth; it did not describe the impact of the crime on the victim's family, or the family members' opinions, and characterizations of the crime and the defendants. See Mills v. State, 310 Md. 33, 72-73, n. 14, 527 A.2d 3 (1987), rev'd on other grounds, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The even more compelling answer to Wiggins's contention is that in Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the Supreme Court reversed its earlier holding in Booth, concluding that the Eighth Amendment does not prohibit a jury from considering, at a capital sentencing hearing, "victim impact" evidence relating to a victim's personal characteristics, and the emotional impact of the murder on the victim's family. Accordingly, there was no error in admitting Ms. Elgert's testimony in evidence.

XII.

Relying upon Art. 27, § 414(e)(4), Wiggins attacks his death sentence on proportionality grounds. He claims that the sentence was excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and therefore violated the statute. Moreover, he argues that his sentence contravened Articles 16 and 25 of the Maryland Declaration of Rights, and the 8th and 14th amendments to the federal constitution.

In Tichnell v. State, 287 Md. 695, 739, 415 A.2d 830 (1980), we said that a death sentence in a murder case "may be affirmed only if juries throughout the State have imposed the death penalty for that kind of offense." The purpose of proportionality review under § 414(e)(4) is substantially to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury, so that if the time comes when juries generally do not impose the death sentence in a certain kind of murder case, this Court can vacate the death sentence. Trimble v. State, 300 Md. 387, 429, 478 A.2d 1143 (1984).

Wiggins says that juries throughout the State have not imposed the death penalty in murder cases involving the single aggravating factor of murder in the course of a robbery. He invites our attention to a compilation of detailed sentencing information in 198 cases of robbery-murder committed since July 1, 1978, involving allegedly similar factual situations, where the death penalty was either not sought or was sought but not imposed.

We have considered the cases that Wiggins presents for comparison purposes. The compilation is much like that considered by us in Collins v. State, 318 Md. 269, 298-300, 568 A.2d 1 (1990), another capital prosecution based on murder committed in the course of a robbery. There, we noted

that similarities and differences were evident in the respective cases presented for our review; but we perceived no useful purpose in setting them out seriatim, with some particular facts included about each case and each defendant, citing Foster v. State, 304 Md. 439, 484, 499 A.2d 1236 (1985), reconsideration denied, 305 Md. 306, 503 A.2d 1326, cert. den., 478 U.S. 1010 (1986). Suffice it to say that our analysis of the "similar cases" formulation of § 414(e)(4) leads us to conclude that the death sentence has been imposed in a significant number of cases where the aggravating circumstance was that the murder was committed during the course of a robbery. See Collins, supra; Foster v. State, supra; Johnson v. State, supra; Colvin v. State, 299 Md. 88, 472 A.2d 953 (1984). See also White v. State, supra.

Wiggins was found to be a first degree principal in the murder-drowning of a defenseless elderly woman in her home during the perpetration of a robbery. From the physical evidence at the scene of the crime, it is evident that the victim struggled with Wiggins before being immersed in her bathtub to suffer a brutal death. Even though the prime mitigating circumstance was Wiggins's lack of a prior criminal record, we conclude that the death penalty in this case was neither excessive nor disproportionate. Nor was it aberrant, arbitrary, capricious, or freakish; and it was not imposed under the influence of passion, prejudice, or because of the existence of an arbitrary factor. Contrary to Wiggins's suggestion, society has not rejected capital punishment for the type of murder-robbery committed in this case, considering both the crime and the defendants in light of similar cases.

XIII.

Wiggins contends that the Maryland death penalty statute is unconstitutional because he was required to prove mitigating factors by a preponderance of the evidence. There

is no merit to this contention. See Walton v. Arizona, 497 U.S. ___, 110 S.Ct. 3047, 3055, 111 L.Ed.2d 511 (1990); Collins, supra, 318 Md. at 296; Calhoun v. State, 306 Md. 692, 739-40, 511 A.2d 461 (1986), cert. denied, 480 U.S. 910 (1987).

Wiggins further contends that the Maryland statute is constitutionally defective because, with respect to those mitigating circumstances not enumerated in the statute, he was required to convince the sentencing authority, by a preponderance of the evidence, not only that the circumstance exists but that it was mitigating in nature. There is no merit to this contention. See Boyde v. California, 494 U.S. ___, 110 S.Ct. 1190, 1196, 108 L.Ed.2d 316 (1990); Franklin v. Lynaugh, 487 U.S. 164, 188, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988); Foster v. State, 304 Md. 439, 476- 80, 499 A.2d 1236 (1985).

Wiggins next maintains that the Maryland statute is unconstitutional because the death sentence may be imposed if the aggravating circumstances outweigh the mitigating circumstances by only a preponderance of the evidence. There is no merit to this contention. See Collins, supra, 318 Md. at 296; Tichnell, supra, 287 Md. at 731- 32.

XIV.

Finally, Wiggins contends that the trial court erred in imposing two eighteen- month concurrent sentences for his two theft convictions. He maintains that these convictions should have merged into his robbery conviction on principles of merger, i.e., that the robbery convictions involved theft of the same property charged in the theft counts of the indictment. The State agreed, pointing out that the thefts were lesser included offenses of the robbery. Accordingly, we shall vacate the theft convictions on counts four and five of the indictments.

JUDGMENT AFFIRMED, EXCEPT AS TO THEFT COUNTS 4 AND 5 OF THE INDICTMENT, AS TO WHICH THE JUDGMENTS ARE VACATED.

IN THE COURT OF APPEALS OF MARYLAND

No. 139

September Term, 1989

KEVIN WIGGINS

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
* Cole
Rodowsky
McAuliffe
Chasanow
Smith, Marvin H.
(retired, specially assigned),
JJ.

Dissenting Opinion by Eldridge, J.,
in which Cole, J., concurs

Filed: November 8, 1991.

*Cole, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Art. IV, Sec. 3A, he also participated in the decision and adoption of this opinion.

Eldridge, J., dissenting:

In my view, the evidence at the sentencing hearing was insufficient for the jury to find, beyond a reasonable doubt, that Kevin Wiggins was a principal in the first degree in the murder of Florence Lacs. Consequently, I dissent from the judgment affirming the imposition of the death penalty.

When reviewing the sufficiency of the evidence, the relevant question is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-2789, 61 L.Ed.2d 560, 573 (1979); *Tichnell v. State,* 287 Md. 695, 717, 415 A.2d 830, 842 (1980). The finding that Wiggins was a principal in the first degree, however, rests entirely on circumstantial evidence. "[A] conviction upon circumstantial evidence *alone* is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." *West v. State,* 312 Md. 197, 211-212, 539 A.2d 231, 238 (1988). *See also Wilson v. State,* 319 Md. 530, 535-537, 573 A.2d 831, 833-834 (1990). The evidence presented at the sentencing hearing would permit a reasonable trier of fact to hypothesize that Wiggins was not a principal in the first degree.

Under the Maryland statutory scheme, the proof concerning guilt required at a capital sentencing hearing is different from the proof required at the guilt or innocence stage of the trial. At the guilt or innocence stage, the State must prove beyond a reasonable doubt that the defendant is guilty of first degree murder. The defendant may be guilty of first degree murder, of course, even though he is a principal in the second degree, an accessory, or guilty under the felony murder doctrine. At the sentencing stage more is required, as the State must show beyond a reasonable doubt that the defendant was

the actual perpetrator of the murder. He must be a principal in the first degree. Maryland Code (1957, 1987 Repl.Vol., 1991 Cum.Supp), Art. 27, § 413(e)(1); Maryland Rule 4-343(e); *Johnson v. State*, 303 Md. 487, 510, 495 A.2d 1, 12 (1985), *cert. denied,* 474 U.S. 1093, 106 S.Ct. 868, 88 L.Ed.2d 907 (1986); *Stebbing v. State,* 299 Md. 331, 371, 473 A.2d 903, 923, *cert. denied,* 469 U.S. 900, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984).[1]

In this case, the evidence produced at the sentencing hearing differed in some respects from the evidence presented at the guilt or innocence stage of trial. For example, the sentencing jury did not hear any testimony from Wiggins's cellmates. Thus, the jury could not take into account the testimony given at the earlier stage of the trial concerning conversations Wiggins allegedly had about the circumstances of the murder with these cellmates. Moreover, the testimony of Wiggins's employer at the sentencing hearing differed somewhat from his testimony at the guilt or innocence stage. In addition, the significance of some of the evidence at the sentencing hearing was different from its significance at the earlier stage. This is true of the evidence pointing to the involvement of someone other than Wiggins in the robbery and murder.

The State's theory was that Wiggins committed the robbery and murder between the time he was initially dismissed from work on Thursday and the time he returned to inform his employer that he had moved some sheetrock. The State's case at sentencing was based on Wiggins's presence near the victim's apartment on Thursday afternoon at approximately 5:00 p.m. and on the fact that Wiggins and his girlfriend used

---

[1] There is one exception to the requirement that the defendant be a principal in the first degree, but it is not relevant here.

the victim's credit cards and car on Thursday night. While this evidence may have been sufficient to establish that Wiggins was involved in the robbery of Ms. Lacs, it was not sufficient to show, beyond a reasonable doubt, that Wiggins was the actual perpetrator of the murder.

The State produced no direct evidence supporting its theory that the victim died at approximately 5:00 p.m. on Thursday. The expert testimony with regard to time of death advanced by the State was more consistent with the defendant's theory that the victim had died on Friday evening. The Death Certificate, as originally filled out by the State's expert, fixed the approximate time of death as Friday evening. At the sentencing hearing, each of the three expert witnesses estimated that the maximum range for a time of death extended back to approximately 9:00 p.m. on Thursday, which was after Wiggins went shopping with the victim's credit cards.

The weakness of the State's theory with regard to time of death was further undermined by the testimony of Edith Vassar who reiterated that she had spoken to the victim over the telephone on Friday morning.[2] Ms. Vassar testified that they discussed the luncheon which she and Ms. Lacs had attended on Thursday afternoon.

Furthermore, two of the girls whose testimony placed Wiggins at the scene testified that Wiggins had spoken to Ms. Lacs about some sheetrock at 5:00 p.m. or 5:30 p.m. The girls testified that Wiggins left the building ahead of them. Wiggins checked in with his employer at approximately 5:05 p.m.

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[2] Ms. Vassar also testified that she had received an anonymous telephone call and that the caller told her that she must be mistaken about the day of the call. At the sentencing hearing, however, Ms. Vassar asserted that she was not mistaken.

According to the employer, he had been gone for twenty minutes.[3] The subcontractor's office was about five minutes away from the victim's apartment. This time sequence does not give Wiggins much time to ransack the victim's apartment, to fill her bath tub with water, to drown her, and to go over the entire apartment wiping off his fingerprints.

Other evidence which tends to weaken an already fragile case of circumstantial evidence is the lack of consistency in the testimony concerning Ms. Lacs's clothing by those who came in contact with her on Thursday, which, according to the State, was the last day of her life. Mary Elgert, one of Ms. Lacs's friends, stated that Ms. Lacs was wearing a light blue skirt and a white blouse Thursday afternoon. Elizabeth Lane, another friend, told the police on Saturday that Ms. Lacs was last seen wearing a red dress as late as 4:00 p.m. on Thursday. One of the girls in the hallway, Chentell Greenwood, testified that at approximately 5:00 p.m. on Thursday, Ms. Lacs had on a red skirt and a white blouse. The pictures of the victim submitted to the jury show that the skirt was dark blue. The color of the skirt was characterized by the defendant's attorney as teal and by Detective Crabbs as green. This conflicting testimony cannot support the inference that Ms. Lacs died on Thursday because she was found in Thursday's clothes.

Finally, evidence was discovered which tended to point to the participation of another person in the robbery/murder.

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[3] Wiggins's employer testified at sentencing that Wiggins was dismissed from work at 4:45 p.m. on Thursday. The employer also testified that Wiggins returned twenty minutes later to inform his boss that he had moved some sheetrock to the front of the building. At the guilt or innocence stage of the trial, as pointed out in the majority opinion, the employer testified that Wiggins had been gone for twenty-five to thirty- five minutes.

Several fingerprints that did not belong to Wiggins were found in the apartment. The places where these prints were found are relevant. They were discovered on the front door arch, the archway wall of the kitchen, and on the doorjamb leading to the bathroom. Others were found on a soap box on the kitchen table which, along with other cleaning items, had been moved from their usual places in the kitchen. In addition to the fingerprints, the investigation also discovered a man's hat bearing a Ryder Rental Truck emblem at the scene. Police were unable to tie this hat to Wiggins, and none of the witnesses who testified that they had seen Wiggins that day testified that Wiggins had been wearing this hat.

When viewed in isolation, the fingerprints and the hat perhaps may not, as the majority states, "support a reasonable hypothesis that another individual was present in the victim's apartment...." When this evidence is added to an already weak circumstantial case, however, the combination leads to the conclusion that the evidence at the sentencing hearing was not sufficient to establish, beyond a reasonable doubt, that Wiggins was the principal in the first degree.

In addition to the insufficiency of the evidence per se, there is another ground warranting a reversal of the death sentence. This Court is required by Art. 27, § 414(e)(4), to conduct a proportionality review. Under the present death penalty statute, this Court has never upheld a death sentence on evidence as weak as that introduced in this case. In the numerous cases where we have upheld the death sentence, there was little question that the defendant committed the murder as a principal in the first degree. Evidence which supported these findings included a confession by the defendant, *Stebbing v. State, supra;* eyewitness testimony to the incident, *Gilliam v. State,* 320 Md. 637, 579 A.2d 744 (1990), *cert. denied,* ___ U.S. ____, 111 S.Ct. 1024, 112 L.Ed. 2d 1106 (1991); *Huffington v. State,* 304 Md. 559, 500 A.2d 272 (1985), *cert.*

denied, 478 U.S. 1023, 106 S.Ct. 3315, 92 L.Ed.2d 745 (1986); *White v. State,* 300 Md. 719, 481 A.2d 201 (1984), *cert. denied,* 470 U.S. 1062, 105 S.Ct. 1779, 84 L.Ed.2d 837 (1985); and fingerprints of the defendant at the scene coupled with the defendant's possession of the victim's property, *Colvin v. State,* 299 Md. 88, 472 A.2d 953, *cert. denied,* 469 U.S. 873, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984). Where the defendant's participation in the murder as a principal in the first degree is based upon a very weak case of circumstantial evidence, a sentence of death is disproportionate.

I would vacate the death sentence and remand for the imposition of a life sentence.

Judge Cole has authorized me to state that he concurs with the views expressed herein.

(3)

Supreme Court, U.S.
FILED
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

The brief in opposition offers no response to the three principal arguments for certiorari set forth in the petition. Respondents do not address the conflict between the Fourth Circuit's "minimal consistency" standard – which the court in this case described as the "criterion of reasonableness for purposes of § 2254(d)" (Pet. App. 11a) – and the significantly stricter standard of review that applies in other Circuits. Nor do Respondents address the conflict between the Fourth Circuit's application of *Jackson v. Virginia*, 443 U.S. 307 (1979), in this case, and the much stricter standard used by other Circuits. Respondents likewise say nothing about the conflict between the Fourth Circuit's "particularly glaring failure" standard for evaluating whether capital counsel have conducted an investigation sufficient to satisfy the Sixth Amendment, *see Strickland v. Washington*, 446 U.S. 668 (1984), and the far stricter standard that prevails in other Circuits. Instead of answering the arguments for review set forth in the petition, respondents have provided a lengthy defense of the Fourth Circuit's decision on the merits. Respondents' arguments on that score are wrong, but for present purposes they are beside the point.

1. Respondents make no effort to defend the Fourth Circuit's "minimal consistency" standard of review for cases under 28 U.S.C. § 2254(d), which, for all intents and purposes, repudiates this Court's teaching in *Williams v. Taylor*, 529 U.S. 362 (2000). In *Williams*, this Court rejected the standard of review previously applied in the Fourth Circuit in § 2254(d) cases on the ground that it was overly deferential to state court judgments. In response, however, the Fourth Circuit has simply interpreted *Williams* as though it approved the Fourth Circuit's prior approach. Only the form of words has changed. The Fourth Circuit standard rejected in *Williams* allowed for relief only if a state court

"applied federal law in a manner that reasonable jurists would all agree is unreasonable." *Williams*, 529 U.S. at 409 (quotation omitted). Now, the Fourth Circuit will allow relief only if a state court decision is not "minimally consistent with the facts and circumstances of the case." Both formulations provide relief only where the state court's determination is so far off the mark that it approaches judicial incompetence. Objectively unreasonable state court judgments can survive review under § 2254(d) under that Circuit's current standard of review just as they could under the standard invalidated in *Williams*, so long as they remain within the outer reaches of the plausible.

There thus remains a conflict between the Fourth Circuit and other courts over the appropriate standard of review in § 2254(d) cases. *See* Petition for Certiorari ("Pet.") at 15-18. So long as the Fourth Circuit continues to apply that standard of review, outcomes in cases under § 2254(d) will predictably diverge from those of other Circuits, and habeas petitioners in the Fourth Circuit will continue to be denied the full measure of protection that Congress intended when it enacted § 2254(d). That is powerfully confirmed by the Fourth Circuit's resolution of the *Jackson v. Virginia* issue, and especially of the *Strickland v. Washington* issue, in this case.

2. Respondents never come to grips with the issue raised in the petition respecting the proper application of *Jackson v. Virginia*. The fundamental problem with the Fourth Circuit's decision is that the court – like the Maryland Court of Appeals before it – did not consider all the evidence in concluding that a reasonable trier of fact could have found Wiggins guilty beyond a reasonable doubt. The factual record is plainly a troubling one, in which the finding of guilt

rested entirely on a chain of inferences from circumstantial evidence. Chief Judge Wilkinson acknowledged in concurrence that he could "not say with certainty" that the evidence showed guilt beyond a reasonable doubt. Pet. App. 24a. Although a court applying the *Jackson* standard need not "affirmatively rule out every hypothesis except that of guilt," *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion) (quotation omitted), neither must the habeas petitioner rule out a hypothesis of guilt. It is not enough that there is some evidence from which an inference of guilt can be drawn. The record *as a whole* must be sufficiently strong to support the inference of guilt *beyond a reasonable doubt*. And that assessment must be made on the basis of all the evidence. The stronger the evidence inconsistent with a hypothesis of guilt, the stronger the evidence supporting the hypothesis of guilt must be to sustain the conviction under *Jackson*. That is the principle that other Circuits have applied in vindicating *Jackson* claims (*see* Pet. at 21-22), and it is the principle the Fourth Circuit refused to follow in this case.

3. Respondents misconceive the Sixth Amendment issue raised in the petition for certiorari. As respondents would have it, the fundamental question in this case is whether Wiggins' trial counsel provided ineffective assistance of counsel by unreasonably choosing to "retry guilt" rather than presenting a case in mitigation at sentencing. But the heart of this case – and the issue on which the Fourth Circuit is in conflict with the prevailing law in other Circuits, as well as this Court's decision in *Williams v. Taylor* – is whether trial counsel adequately *investigated* the potential mitigation case that could be made on Wiggins' behalf. Without adequate investigation, trial counsel cannot "competently advise [a client] regarding the meaning of

mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue. *Battenfeld v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001); *see also Coleman v. Mitchell*, 268 F.3d 417, 447 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002).

The fact is that the Fourth Circuit differs sharply from other Circuits in the standard it applies to decide whether trial counsel in a capital case has conducted a sufficiently thorough investigation to meet the Sixth Amendment's requirements for effective assistance of counsel. The established rule in numerous Circuits is that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999). As demonstrated, the Fifth, Sixth, Eighth, Ninth and Eleventh Circuits have all held – in circumstances analogous to those of this case – that trial counsel's "tactical" choice to forego a mitigation defense cannot be reasonable if counsel did not thoroughly investigate available mitigating evidence prior to making the choice. *See* Pet. at 25-29. To advise a client and make an informed tactical choice, trial counsel must know what they will be giving up if they forego a mitigation case in favor of an alternative defense.

In marked contrast, the Fourth Circuit in this case upheld defense counsel's choice to forego a mitigation defense in a situation in which counsel did not do the kind of investigation that other Circuits routinely require as a prerequisite for deferring to such tactical choices. In the Fourth Circuit, capital counsel need not conduct the kind of thorough investigation that other Circuits routinely require as a Sixth Amendment minimum. For the Fourth Circuit, it is

enough that counsel have "some knowledge about potential avenues of mitigation." Pet. App. 19a. The Fourth Circuit's opinion is replete with statements that only "a particularly glaring failure" or a "wholesale failure" of counsel's duty to investigate will justify Sixth Amendment relief. Pet. App. 17a, 19a. Indeed, the Fourth Circuit went so far as to claim that this Court's decision in *Williams* set forth that standard, even though *Williams* contains no language even remotely suggesting such a standard. And as a result of applying that lax standard, the Fourth Circuit rejected Wiggins' Sixth Amendment claim even though his counsel did not do the kind of investigation that other Circuits routinely require, and thus were in no position to assess – or to advise their client about – the relative strengths of a mitigation defense (which would have been extremely powerful here) and the effort to "retry guilt." There is thus a sharp and persistent conflict between the Fourth Circuit and the prevailing law of other Circuits on this important question.

When respondents do finally seek to defend the investigation that Wiggins' trial counsel undertook in this case, they egregiously misstate the record. Respondents cite testimony allegedly establishing that Wiggins' trial counsel had investigated and knew the mitigation evidence, and therefore made an informed decision to forego a mitigation case at sentencing. Brief in Opposition at 26-27. But – as respondents know full well – the testimony establishes far less than respondents suggest. Although Wiggins' counsel initially indicated that he knew the details of Wiggins' childhood, he ultimately testified only that "he knew that [information] as it was reported in other people's reports" – *i.e.*, the social service records. He had not done any investigation beyond obtaining those reports. After hearing the very testimony quoted by respondents, the state habeas

court made findings that Wiggins' trial counsel did *not* know the facts of Wiggins' childhood – the horrible privations and physical abuse inflicted by his mother, the repeated sexual predation to which he was subject while in foster care, the homelessness, and the other brutal facts of his youth. CA App. 1437 ("I have no reason to believe that [trial counsel] did have all of this information [in Wiggins' social history]"). *See also* Pet. App. 142a n.269 ("[N]ot a single report by any other health care professional reported the abuse. Nor was there a mention of abuse against Wiggins in any report of the DSS.").

The Maryland Court of Appeals acknowledged that the source of trial counsel's knowledge was the social service records. Pet. App. 121a-122a. That court, however, went on to err in concluding that those records included "detailed social service records that recorded incidences of physical and sexual abuse." *Id.* at 121a. The Maryland Court of Appeals made no mention of the specific findings made by the trier of fact on this issue – the state habeas court, which heard the testimony quoted by respondents – that trial counsel had not discovered the mitigating evidence developed in postconviction proceedings. In the district court, Chief Judge Motz examined the social service records, and concluded that the Maryland Court of Appeals had been "erroneous" in concluding that "much of the critical information . . . had been contained in social service records available to trial counsel." Pet. App. 54a n.16. Remarkably, the Fourth Circuit ignored the district court's unambiguous conclusion, and instead stated that Wiggins' trial counsel "did know about Wiggins' difficult childhood, as the district court acknowledged." Pet. App. 20a.

Ultimately this is not a matter on which there is room for reasonable interpretation. Either the social service records contain this evidence or they do not. If they do not, then there is no basis whatsoever for the factual finding on which the Maryland Court of Appeals rested, and which the Fourth Circuit cited to bolster its conclusion that Wiggins' counsel did not commit a "particularly glaring failure of counsel's duty to investigate." Pet. App. 19a. The social service records speak for themselves, are a part of the record of this proceeding, and have been submitted to this Court for review. They simply do not contain the powerful mitigating that would have been available had Wiggins' trial counsel adequately investigated Wiggins' background – or made use of available public funds to hire an expert to prepare a social history comparable to the one prepared for the postconviction proceedings (*see* Pet. App. 163a). No reasonable person could read the records and conclude that they support a finding that trial counsel knew of the physical and sexual abuse Wiggins suffered as a child, or of the many other horrible privations detailed in the social history prepared during the postconviction proceedings. Thus, there is no basis for relying on the statement by the Maryland Court of Appeals that the records contained the facts trial counsel needed to make an informed decision. *See* 28 U.S.C. § 2254(d)(2).

That an error so basic and so important could have occurred in this case vividly confirms the need for review. The Fourth Circuit's failure to come to grips with the record is a direct and obvious consequence of the supine standard of review the court continues to apply in § 2254(d) cases involving allegations of ineffective assistance of counsel. Future errors of this kind will be the predictable result of applying a "minimal consistency" test in § 2254(d) cases,

and of providing for relief only in cases involving "particularly glaring" or "wholesale" failures of capital counsel's duty to investigate potential mitigation evidence.

There is a pressing need for this Court to resolve the conflict between the Fourth Circuit and the prevailing law in other Circuits on this important Sixth Amendment issue. The adequacy of counsel's investigation arises in most, if not all, capital cases, and is thus certain to recur. Capital defendants in the Fourth Circuit will continue to be denied relief on their Sixth Amendment claims in situations where other Circuits would provide relief as a matter of course. On a matter as fundamental as the right to the effective assistance of counsel at capital sentencing, a conflict of this kind is intolerable.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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October 15, 2002

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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX
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PETITION FOR CERTIORARI FILED AUGUST 27, 2002
CERTIORARI GRANTED NOVEMBER 18, 2002

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In the Circuit Court for Baltimore County

Case No. 88-CR-5464

State of Maryland v. Kevin Wiggins

Filing Date: Oct. 20, 1988 Case Type: Indictment

Dec. 8, 1988	State's Notice of Intention to Seek Sentence of Death.
Aug. 1, 1989	Jury trial waived, testimony taken, trial not concluded.
Aug. 4, 1989	Trial resumed, testimony taken. At end of entire case defendant's motion for judgment of acquittal - overruled. Pre-sentence investigation ordered by the court.
Aug. 7, 1989	Count 1 Murder Plea: Not Guilty Finding: Guilty Count 2 Robbery - General Plea: Not Guilty Finding: Guilty Count 3 Burglary - Int/Steal/Night Plea: Not Guilty Finding: Judg Acqt Count 4 Theft Plea: Not Guilty Finding: Guilty Count 5 Theft Plea: Not Guilty Finding: Guilty

Count 6 Theft
Plea: Not Guilty Finding: Merged

Oct. 12, 1989	Jury selected and sworn.
Oct. 18, 1989	Trial resumed. At this point in the proceedings, defendant's request for stay of execution - granted as to count #1.
Jan. 19, 1993	Defendant's Petition for Post Conviction Relief.
Jan. 7, 1994	Hearing had in re: Post Conviction. Hearing continued to a later date. Writ to be issued for defendant on 1/18/94.
March 28, 1994	Hearing had in re: Post Conviction. Hearing continued from 3/18/94. Hearing not concluded, to resume 3/29/94.
March 29, 1994	Hearing resumed. Testimony taken. Hearing not concluded, to resume 4/6/94 for arguments.
April 6, 1994	Hearing had in re: Post Conviction. Hearing resumed. Testimony taken. Arguments by counsel presented. Hearing not concluded. Hearing continued to 4/7/94 at 9:30 A.M.

April 7, 1994[1]	Post Conviction Hearing is resumed. Arguments continued and concluded.
May 25, 1994	Hearing had in re: Post Conviction - memorandum opinion to be filed.
Oct. 22, 1997	Judgment and Opinion Order of the Court Denying Post conviction relief.

[1]Court docket sheet incorrectly identifies this date as April 8, 1994.

JA 4

Court of Appeals for the State of Maryland

No. 139 Sept. Term 1989

Kevin Wiggins v. State of Maryland

Nov. 8, 1991	Judgment affirmed, except as to theft Counts 4 and 5 of the indictment, as to which the judgments are vacated. Opinion by Murphy, C.J. Dissenting opinion by Eldridge, J., in which Cole, J. concurs.

JA 5

Court of Appeals for the State of Maryland

No. 121 Sept. Term 1997

Kevin Wiggins v. State of Maryland

Feb. 10, 1999	Order denying petition for post conviction relief affirmed, with costs. Opinion by Wilner, J. Dissenting opinion by Eldridge, J., in which Bell, C.J., joins.

United States District Court for the
District of Maryland

No. 99-CV-2420

Kevin Wiggins v. Thomas R. Corcoran

Aug. 8, 1999	PETITION for writ of habeas corpus; FILING FEE $5.00 Receipt # B160035 (ck) [Entry date 08/10/99]
Sept. 18, 2001	ORDER granting [1-1] petition as to claims of insufficiency of evidence and ineffective assistance of counsel with regard to the failure to present mitigating evidence during sentencing; DENYING Petitioner's claims; VACATING the conviction and sentence of Kevin Wiggins; DIRECTING that the Petitioner shall be RELEASED within 30 days unless within that time respondents advise the Court that they intend to appeal this decision; DIRECTING that the case be CLOSED (signed by Chf Judge J.F. Motz 9/18/01) (eg) (c/i & microfilmed 9/18/01) [Edit date 09/18/01]

United States Court of Appeals
for the Fourth Circuit

No. 01-23

Kevin Wiggins v. Thomas R. Corcoran

May 2, 2002	Published, authored opinion filed. [01-23] (beth)
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In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
July 25, 1989
Towson, Maryland

Before:
Honorable J. William Hinkel, Associate Judge

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MS. NETHERCOTT: One final motion concerning a defense motion to compel the State to come forward with evidence regarding the aggravator that they intend to rely on in this case. The thing is -- Your Honor has probably learned from the prior motion there's obviously an issue here regarding the sequence of events.
The discovery that has been provided to defense counsel in this case indicates the evidence shows Mr. Wiggins was in possession of belongings of Ms. Lacs on the 15th. There's a witness who has been deposed who indicates that she was alive the morning of the 16th.
THE COURT: Who is that witness by the way?
MS. NETHERCOTT: The witness is Edith Vassar, Your Honor. In light of that, the argument is that the State should be required to come forward and proffer at this point what their evidence is as to the existence of this aggravating factor for the simple reason to place the

defense in the position that we are now placed in, which is solely by virtue of the fact that the State has filed a notice of the intention to seek the penalty of death, the defense, if they elect to have a jury trial in this

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matter, is forced to go through the procedure of impaneling a death qualified jury, and I would submit that is highly prejudicial for a number of reasons.
I would direct the court's attention, and I have a copy of it with me here, a Supreme Court case of *Lockhart v. McCrae* (phonetically). The case was decided, I believe, back in 1984, and the issue before the court at that time came about as a result of two consolidated cases, *Brisby v. Georgia*, which was a case raising the same issue as *Lockhart v. McCrae*, and they were consolidated for resolution of the question as to whether or not the defendant's right to a jury of a fair cross section of the community was compromised or violated by virtue of having to have a death qualified jury preside over the guilt/innocence phase.
Essentially, Your Honor, it was a request that in these type of cases that the defendant be given a bifurcated jury. One jury to decide the issue of guilt or innocence. One jury to decide the issue of sentencing.
This case I believe came about starting back with Witherspoon which, of course, as I'm sure the court is aware, stands for the proposition that the defense is entitled to have on a jury a prospective juror who may have scruples against the death penalty. The logic of that opinion, Your Honor, as it was reflected in the

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Supreme Court's opinion on the matter was essentially that the State was not -- that it was not fair to the defendant for the State to be able to utilize a jury that was more prone to convict.
There have been for a long time many, many studies dealing with this entire question of death qualified juries being more conviction prone. Witherspoon reserved on the issue as to whether or not there was -- Witherspoon indicated there was not sufficient evidence at this time to support the proposition that, in fact, these type of jurors are more conviction prone.
We get to *Lockhart v. McCrae* and there's an extensive record from the Appeals Court. Of course, the record was made in the District Court and the opinion is written by Judge Rehnquist, who although quite candidly, Your Honor, he seems to have some dispute with some of the methodology of the statistics, he does indicate in the opinion that for purposes of argument, he's accepting those studies as valid.
And if the court is inclined, I can read them to the court. There's a number of studies that were presented and litigated. I don't know if the court wishes me to cite them here, but I can give you the page citation.
THE COURT: That's up to you.

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MS. NETHERCOTT: The page citation of the Lawyer's Edition, 2d. Ed. 137 on page 157, footnote 3 compiles all of the various studies that were presented in support of this proposition. The court accepted that

proposition that, in fact, these juries may be more conviction prone.
The holding of the case was that did not violate the defendant's right to a jury comprised of a fair cross section of the community, and essentially, I believe the court arrived at that conclusion on the basis that there had not prior to that time been a recognition that someone's right to a jury included a jury of different viewpoints.
We recognized the right to a representative injury including racial minorities and gender issues but not as to opinions, and obviously, that had to be balanced against the State's legitimate interest in a jury that could follow the law.
I would submit, Your Honor, though that this case arises in a different posture. That in a case where the State prior to commencement of the guilt/innocence proceeding where the nature of the evidence is revealing an inability to prove the one aggravating factor which is the sole basis that the State is relying on to force this to a death penalty proceeding.

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I would argue that in that particular situation, it is highly prejudicial, and it impacts Mr. Wiggins' right to an impartial jury, very specifically, a jury that will arrive at a determination of guilt or innocence impartially is being violated by the position that the defense has been forced into here.
Additionally, whatever rights he has under Maryland State law regarding the jury composition and also the exercise of any peremptory challenges is prejudiced by this also because those jurors who may not been excluded

on the basis of their views and attitudes toward the death penalty, the defendant is in a position of having to quite likely utilize peremptory challenges to get rid of those jurors. I would submit under the particular facts and posture of this case, that it is highly prejudicial to allow this to proceed.
THE COURT: Ms. Brobst.
MS. BROBST: I don't have the cite but the Grandison case in Maryland has indicated that the so-called death qualified jury is not unconstitutional and that you can proceed with a jury that has been asked the so-called death qualifying questions.
Again, I guess, if the defense wants to file a bill of particulars with respect to the information upon which the State is going to rely to prove a robbery, they

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may, and we would be required to answer that, but I can state --
THE COURT: I don't think she's specifically asking that. I think she's asking if that's what you're going to use to prove the robbery? Is that what you are saying, Ms. Nethercott?
MS. NETHERCOTT: My question, Your Honor, is what? I assume, obviously, the robbery is the aggravator cited, but the question is the sequence because if the robbery occurred on Thursday and the woman died at some future time, it is unconnected to that robbery, and then it is not an aggravator.
THE COURT: But the State, as I understand, is going to prove that the robbery occurred at the time of the murder. Isn't that the State's theory, Ms. Brobst?
MS. BROBST: Yes, Your Honor.

THE COURT: Isn't that what you want them to state on the record?
MS. NETHERCOTT: Well, I'm asking them to state how they are going to prove that.
THE COURT: Well, that's a little different.
Ms. Brobst, your response?
MS. BROBST: Is the court going to require me?
THE COURT: No. I didn't ask you to do that.

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I asked you your response to their demand that you tell them how you are going to prove it.
MS. BROBST: Well, I'm going to --
THE COURT: I'm not asking you to tell them how you are going to prove it. I'm asking your response.
MS. BROBST: I'm respectly declining to say how we are going to prove it. I'll say that the defense has all of the police reports and all of the information that we have in the case, and we'll be introducing evidence in the case which will prove it. Information which you have.
THE COURT: Ms. Nethercott, on what authority do you rely that the State -- on what authority do you rely that would require the State to tell you how it is going to prove that the robbery and murder occurred at the same time?
MS. NETHERCOTT: Excuse me for a moment, Your Honor. Your Honor, I don't have a specific case I can cite that would apply on all four's to the situation --
THE COURT: On three of the four?
MS. NETHERCOTT: -- that I am confronted with. Your Honor, the argument I think is one of logic.

23 It is one of fundamental fairness. It's an argument that
24 the question has to some extent remained open in light of
25 *Lockhart v. McCrae's* explicit recognition that such a jury

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1 is not impartial on the question of guilt/innocence.
2 THE COURT: You now know -- I'm sorry. Go
3 ahead.
4 MS. NETHERCOTT: Under the particular
5 circumstances of this case, Your Honor, I think it is
6 fairly unique with regard to the situation it presents in
7 terms of the proof problem.
8 THE COURT: Well, you know that the State is
9 relying on the robbery. If the State proves that the
10 defendant murdered the victim in the course of a robbery,
11 then you are likely to go onto the next stage of this
12 proceeding.
13 If the State doesn't prove that, then you are
14 not likely to go onto the next proceeding because it would
15 seem that they would probably find him not guilty if they
16 would believe he was in the car on the 15th and that she
17 was alive on the 16th but found dead on the 17th and can't
18 connect him thereafter.
19 MS. NETHERCOTT: But the problem is, Your
20 Honor, that all of the studies that the court has
21 acknowledged in this case say that the likelihood is that
22 a jury is more likely to convict simply because they are
23 death qualified because they will sit through discussions
24 about the death penalty. They will know --
25 THE COURT: I'm not going to quarrel with you

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1 about those statistics. I have no basis for quarreling
2 with you, but I don't understand or I'm not persuaded that
3 the State must tell you how it will go about proving its
4 case.
5 MS. NETHERCOTT: Well, the reason is, Your
6 Honor, because if the court agrees --
7 THE COURT: You have all of the information
8 that they have right now.
9 MS. NETHERCOTT: I understand, Your Honor,
10 but if the court agrees that this does present an issue
11 that is potentially very prejudicial to Mr. Wiggins, the
12 only way it seems to resolve that question would be to
13 require the State to come forward and state what this
14 evidence is.
15 I mean, if we take it to the other extreme
16 that the evidence was even more tenuous that he was in
17 possession of her things three weeks before this occurred,
18 and there's just simply no way that would show a murder in
19 the course of a robbery. The State would be free simply
20 by filing the death notice to proceed with a death
21 qualified jury. We can't get to the point of resolving
22 that until we know.
23 THE COURT: Do you believe that you have all
24 the information that the State has concerning the case?
25 That they have given you everything? Let's assume that

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1 they have.
2 Now, you want the State to tell you how they
3 are going to use that and what order and from whom and all
4 of that. Lay that out here so you can make a decision on

whether it should be court trial or jury trial? That's what you are asking them to do.
MS. NETHERCOTT: Basically, I'm asking for some prima facia showing that there's sufficient evidence of this aggravator.
THE COURT: I should have a mini trial in order to prepare you for the jury?
MS. NETHERCOTT: A prima facie case could be through a proffer, Your Honor.
THE COURT: I'm not going to require the State to do that. The State, if it wishes, may, but I'm not going to require the State to do that. I think they have given you everything they know about the case, the names of the witnesses, the evidence that they have. That they are relying on the robbery as the death qualifier. To do more I think is not required by any cases that you have given to me or that to my recollection, which is sometimes faulty, the appellate courts have said is demanded of the State, so that request is denied. Anything else?

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DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

DIVISION OF PAROLE AND PROBATION

PRE-TRIAL INVESTIGATION

NAME: WIGGINS, Kevin (NMN)

ALIAS: None

TELEPHONE NUMBER: 233-3959

ADDRESS: 1013 Walnut Ave. Baltimore, Md 21233

DATE OF BIRTH: 9/2/61
AGE: 27

PLACE OF BIRTH: Baltimore, Md

SEX: Male RACE: Black

HEIGHT: 5'9" WEIGHT: 185

DATE REFERRAL RECEIVED: 4/14/89

DATE COMPLETED: 7/25/89

INVESTIGATOR: C. Albert Henry

INVESTIGATOR'S PHONE NO: 887-6538

COURT: Baltimore County Circuit

INDICTMENT NUMBER: 88CR5464

OFFENSE: Murder - First Degree
Credit Card Violations
Theft

TRIAL JUDGE: A. Owen Hennegan

MARITAL STATUS: Single

TRIAL DATE:

OCCUPATION: Security

PLEA: Not Guilty

EDUCATION: 10th Grade

TRIAL : Unknown

SOCIAL SECURITY NUMBER: 215-90-0724

DETAINERS:

DRIVER'S LICENSE NUMBER: W252-465-022-684

SID NUMBER: 349573

BOND: Incarcerated

FBI NUMBER: 242759X3

CUSTODY: Baltimore County Detention Center

DEFENSE ATTORNEY: Michele Nethercott

CO-DEFENDANT'S & STATUS: None

STATE'S ATTORNEY: S. Ann Brobst

SENTENCING JUDGE: A. Owen Hennegan

DATE OF DISPOSITION:

DISPOSITION:

FILE NUMBER: WIK44455

THIS REPORT IS FOR OFFICIAL COURT AND DEPARTMENTAL USE ONLY. INFORMATION

CONTAINED HEREIN IS CONFIDENTIAL AND PROTECTED BY BOTH STATE AND FEDERAL LAWS AND REGULATIONS. THIS REPORT IS NOT AVAILABLE FOR PUBLIC INSPECTION OTHER THAN AS OUTLINED UNDER ARTICLE 41, SECTION 124(b) OF THE ANNOTATED CODE OF MARYLAND.

DESCRIPTION OF PRESENT OFFENSE

The Statement of Charges reveals that, on 9/17/88, the police responded to the apartment of Florence C. Lacs and found her "deceased under suspicious circumstances." They also determined that her car had been stolen and, that during the unlawful entry, her wallet and credit cards had been removed form the premises. An investigation revealed that the credit cards were subsequently used at JC Penney, Sears and the Hecht Company. On 9/21/88, the defendant was stopped by the police while driving the victim's vehicle and the charges flow therefrom.

He also was wearing two rings which had been purchased with the stolen credit cards on 9/16/88.

STATEMENT OF DEFENDANT

Inasmuch as this is a Pre-Trial Investigation, the charges were not discussed with the defendant when he was interviewed.

CRIMINAL RECORD

JUVENILE

A check with the local office of the Juvenile Services Administration revealed no juvenile record.

ADULT

INSTITUTIONAL/PAROLE AND PROBATION HISTORY

The defendant has been in custody since his arrest and he acknowledges some institutional problems. There have been Incident Reports and he notes a few encounters with several guards. On November 13, 1988, he was placed in isolation after threatening suicide and a sheet was reportedly found on his window grate. As a result thereof, he was placed in isolation until he was seen by the jail physician. On 12/24/88, he was charged with being verbally abusive and argumentative, and, as a result, he spent time locked in. On 1/8/89, he was observed banging his head on a rail and, after becoming verbally abusive toward the officer, he was locked in for five days. Thereafter, he was charged with extending a personal visit and, for this, he lost certain privileges.

There is no known record of confinement beyond the foregoing and there is no known record of formal supervision.

PERSONAL HISTORY

The defendant reports little contact with his natural parents and he spent most of his life in foster care. He estimates he lived in seven or eight different homes, the longest period of which was with a woman who is now deceased. He describes his background as generally "disgusting," but he believes, somehow he "will get it together." He notes that he has lived on the streets since he was sixteen, although occasionally he was able to rent a room. He speaks highly of his half-sister, Charlene, who reportedly shared some of his misery as a youth

and they have maintained contact during his period of confinement.

Ms. Charlene Wiggins was interviewed on 7/23/89 and she confirmed that she and the defendant were raised together in foster care. However, she reports that they lived in only three homes, the longest of which was nearly ten years, and, although somewhat strict, the last foster mother, Mrs. Lenore Miner, provided "a nice home with a roof over our heads." As for her contact with the defendant, she notes that she saw him every three or four months prior to the arrest, and, although she has not been able to visit him at the detention center, she has talked with him by telephone on a number of occasions. She also reports that his natural mother, who has no contact with him, is an alcoholic, but she has no information on his natural father. She also is unaware of any substance abuse history or psychiatric intervention.

EDUCATION

The defendant reports that he quit school in grade ten at Northwestern High after deciding to go to work to support himself. He notes that he became "lost" after skipping several grades in elementary school and thereafter, "everything was down hill." He also reports failing the G.E.D., but present plans call for him to complete his education in the near future.

EMPLOYMENT

NAME/ ADDRESS	DATES	NATURE/ EARNINGS	REASON LEFT
Incarcerated	September, 1988 -	–	–

	present		
Joseph Winberg Clark Manor Apartments, Woodlawn, Md.	9/14/88 - 9/20/88	Painting, $4.50/hour	"Fired"
Backfin Restaurant, Route 140, Baltimore, Md. 21208	6/88 - 7/88	Dishwasher, $4.10/hour	"Quit"
St. Paul Security, Baltimore, Md.	3/88 - 5/88	Security, $4.00/hour	"Quit"
Madison Contractors, Baltimore, Md.	4/86 - 8/87	Security, $4.75/hour	"Quit"
USF&G 100 Light St., Baltimore, Md.	1980 - 1984	Porter, $5.00/hour	"Quit"

As for the painting job, briefly held in September, 1988, the defendant reports he was fired when his boss discovered that he lacked the necessary skill to perform that type work.

A spokesperson for the Backfin Restaurant verified the brief period of employment in 1988 and indicated that the defendant was "a good worker who was always here on time."

The Chesapeake and Potomac Telephone Company has no

listing for St. Paul Security and Madison Contractors did not respond to a message left on their recorder.

A spokesperson for USF&G reported on 7/21/89 that the defendant worked there as a porter from 1982-1984, but no additional information could be released.

HEALTH (Physical and Mental)

The defendant describes his health as "excellent" and there are no problems at this time.

He describes himself as a light drinker and he reports experimenting with Marijuana on one occasion ten years ago. He recalls becoming "paranoid" after that experience and, since then, he reports no substance abuse.

The defendant recalls being taken to a counselor when he was age ten for what he describes as "confusion," but he recalls being told that "nothing was wrong." Since then, there have been bouts of depression, which have become more frequent since he has been confined, but he notes that he recently found some degree of tranquility through religion. There is no psychiatric report in his jail file, notwithstanding the reported suicide attempts, and he denies ever being evaluated or treated by a psychiatrist. He does note, however, that a preacher visited him on three occasions but complained on the last visit that the defendant was keeping him from a tennis match.

FINANCIAL

ASSETS	**OBLIGATIONS**
None	None

/s/ John Mellendick, Jr. 7/27/89
John M. Mellendick, Jr. Date
Field Supervisor I

/s/ C. Albert Henry 7/27/89
C. Albert Henry Date
Parole/Probation Agent Senior
Division of Parole/Probation
New Courts Building
401 Bosley Avenue
Towson, Maryland 21204

In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
Towson, Maryland
August 1, 1989

Before:
Honorable J. William Hinkel, Associate Judge

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13 THE COURT: Mr. Wiggins, would you stand up
14 for a moment, sir? Yesterday I received a letter from
15 your counsel Mr. Schlaich and Ms. Nethercott advising the
16 court that you intend to give up your right to a jury
17 trial with respect to the guilt or innocence stage of this
18 proceeding and that you want your case to be determined by
19 the court sitting without a jury; is that correct?
20 THE DEFENDANT: Yes, sir. The reason why is
21 because I feel as though by having the death penalty over
22 my head, they are going to pick the jury, and they are
23 going to be people for the death penalty, and I think it's
24 prejudice for that because they are more likely to go for
25 the State and that's why I'm going for a judge.

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THE DEFENDANT: My decision is to go with a judge because I have the death penalty over my head, and I feel as though the people that agree to the death penalty are more likely to go with the State, and I feel as though, you know, that's a prejudice in that area.
THE COURT: I understand then that you are giving up your right to a jury trial?
THE DEFENDANT: Yes, sir.
THE COURT: For this phase of the proceeding?
THE DEFENDANT: Yes, I am.

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In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
Towson, Maryland
August 3, 1989

Before:
Honorable J. William Hinkel, Associate Judge

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MR. SCHLAICH: Now, let me ask you have you made a decision as to whether to testify or to choose to elect to remain silent?
THE DEFENDANT: Yes, I have.
MR. SCHLAICH: What is your decision?
THE DEFENDANT: I made a decision. I want to tell the judge the reason why I'm going to say, okay, that I don't want to testify is for the point that everything I wanted to say I had already said to my lawyers. I don't feel as though I need to say anything else, and I let them represent me, Ms. Nethercott and Carl.

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In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
August 4, 1989
Towson, Maryland

Before: Honorable J. William Hinkel, Associate Judge

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THE COURT: I suppose I should start by saying that there are certain things in the case that the State and the defendant need to know that I do not consider as real evidence in the case.

As a fact finder, it is my responsibility to weigh all of the evidence which is available to the State and favorable to the defendant, favorable including all those reasonable inferences that can be drawn from the evidence.

So you all don't wonder throughout what I am about to say, let me tell you that John McElroy is not believed by this court. I do not believe that the defendant made the statement to McElroy which McElroy atributes to the defendant. I just don't believe it.

With respect to Christopher Turner, I'm persuaded even more now than I was when I ruled on the motion that he was competent to testify. As he went along, I became even more certain that he was competent to

testify, but as he went along, I became more and more convinced that he was not trustworthy, and I do not believe that the defendant gave a statement to Mr. Turner

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confessing this crime. I do not believe his statement that Turner attributes to the defendant was, in fact, made.

The evidence persuade me to these facts:

That the defendant was employed at the Clark Manor apartments for the subcontractor Robert Weinberg or the Weinberg family anyway. He was there working in and around Apartment F of 1951 Woodlawn Drive. I'm persuaded that the defendant knew who Mrs. Lacs was. I'm further persuaded that he knew that the red orange Chevette was her car.

The testimony of Chianti Thomas is not strong as a positive identification of the defendant, but when taken with the other evidence that is without any serious dispute, I'm persuaded that she saw him there, but even without Chianti Thomas's testimony or photo ID, I'm persuaded that Mr. Wiggins was at the apartment area. No one saw him in the apartment but he was seen in the hallway. Seen outside. He worked there. He was there at a relevant time.

I find also as a fact that the defendant was in possession of Mrs. Lacs' automobile and at least two of the credit card on the evening of Thursday, September 15th. This court rejects as untrue what is stated in Mr. Wiggins's written statement given to Detective Crabbs. I

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do not believe that he came upon that vehicle at 1 o'clock on the parking lot of Roy Rogers. That is just not so. He came into possession of that automobile and those credit cards and for that matter, the ring, on the evening of September 15th. That I find as a fact.
Now, a lot has been made over the exact time of death. I don't know the exact time of death. I am persuaded, however, from all of the evidence that the death of Mrs. Lacs did not occur sometime between 9 p.m. on September 17th and 3:00 a.m. on 9 - 17, which would be the 18 hour period that was testified to by Dr. Kauffman. I am persuaded that it occurred on Thursday the 15th of September.
The cause or the manner of death is undisputed, and I find from all of the evidence that the manner of death was homicide. I don't intend to make a finding of fact as to every piece of evidence that has been introduced, but I do believe it is important to state what other facts I find to be true.
Ms. Elgert testified that Mrs. Lacs was wearing a white blouse and a blue skirt on Thursday. On Saturday she was wearing a white blouse and a blue skirt. That's not only in testimony. Although it was called a bluish green skirt, the photographs indicate a blue skirt, the color photographs. She either saw that on Thursday,

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or she predicted that the next day Mrs. Lacs would wear that same combination. I find as a fact that she was wearing it on Thursday and that Mrs. Lane was mistaken when she gave a missing person's report that it was a red

dress.
I also find that the credit cards were, as I said, not found in the car but were taken from the apartment. There's ample evidence in this case to support that. The ransacking of the apartment took place at the same time that the property was taken. The credit cards were taken from the apartment as well as I am persuaded that the keys came from the apartment. That all occurred on Thursday.
We know that the car was gone, and we know that the credit cards were in the possession of the defendant on Thursday. The ransacking took place on Thursday. How the defendant entered the apartment is not known, and it makes no difference, for I'm persuaded that he entered the apartment and that he was the one who took the property.
As close as I can come to the time that it occurred is that it had to occur sometime after the defendant finished work on Thursday at the time he appeared with the automobile and credit card at the home of Geraldine Armstrong. That leaves to be explained the

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testimony of Ms. Vassar who says she spoke with Mrs. Lacs on Friday about 10 or 10:30 in the morning. The State, of course, vouches for its own witnesses, but I don't believe that Mrs. Vassar correctly remembers. All of the other evidence in this case is so overwhelming that it is not so.
The defendant, of course, is in possession of recently stolen property. The defense argues that any presumption that he is the robber is rebutted by the testimony of Ms. Vassar, but my decision is not based on

any presumption arising from the recent possession of stolen property, but my belief and fact finding and decision is based upon all the evidence that I have weighed in this case and not by any presumption. I'm persuaded beyond a reasonable doubt that the defendant caused the death of Florence Lacs and that this was done wilfully, deliberately and premeditatedly. I'm further convinced beyond a reasonable doubt that the defendant committed the crime of robbery?
THE DEFENDANT: He can't tell me I did it. I'm going to go out.
THE COURT: That during the commission of the robbery, the defendant killed Florence Lacs?
THE DEFENDANT: I didn't do it. He can't tell me I did it.

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THE COURT: Therefore, the verdict is guilty of the first and second counts. First count being first degree murder and the second count being robbery. I'm further convinced beyond a reasonable doubt that the defendant committed the crime of theft, the taking of the credit card and that he committed the crime of theft by taking the automobile of Mrs. Lacs; therefore, the verdict is guilty as to the fourth and fifth counts. The sixth count is also in reference to the automobile and is merged into the fifth count.
MS. BROBST: Your Honor, on the 29th of November the State notified the defendant of its intention to seek a sentence of death in this case and in the alternative, a sentence of life without the possibility of parole.
THE COURT: Mr. Schlaich.

MR. SCHLAICH: Your Honor, first of all, I would note that there has been a pre-sentence investigation started in this case but not completed is my belief. Furthermore, Your Honor, the defense has not completed its preparation to take this case to a sentencing phase.
We have, obviously, spent a long amount of time preparing the guilt/innocence part of this trial. There are many things to do, including the examination of

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Mr. Wiggins by various experts and notifying the State of those expert opinions as well as concluding various statistical studies and things that we will attempt to enter into evidence and that I do believe are admissible into evidence, and for all of those reasons, Your Honor, we are not prepared to go to sentencing today. I would ask for a date sometime in September or thereafter.
THE COURT: I believe that's reasonably necessary.

* * * *

STATE OF MARYLAND
vs.
KEVIN WIGGINS

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
CASE NO. 88 CR 5464

MOTION FOR BIFURCATED SENTENCING PROCEEDING

Defendant, Kevin Wiggins, by his undersigned counsel, moves this Court for an Order bifurcating the sentencing trial in this case, and in support thereof says:

1. Pursuant to Maryland statute, the State must prove in sentencing trial in this matter (a) that the defendant was a principal in the first degree and (b) the existence of aggravating factors which outweigh the mitigating ones.

2. A sentencing hearing that simultaneously tries the issues of principalship and aggravation/mitigation will result in the admission of evidence with respect to the latter issues which is prejudicial and inadmissible as to the former.

3. In order to protect the defendant's rights under the United States Constitution and the Maryland Declaration of Rights, and to comply with the terms of the Maryland sentencing statute, the sentencing trial should be bifurcated to require the determination of the principalship issue prior to the introduction of evidence which is relevant only to the aggravation/mitigation issue.

4. Bifurcating the sentencing will not unduly burden the Court nor unfairly prejudice the State.

5. For these reasons, and those set forth more fully in the memorandum submitted in support of this motion and

incorporated herein, defendant's motion for bifurcation should be granted.

WHEREFORE, defendant, Kevin Wiggins, requests that the Court enter an Order bifurcating the sentencing trial in this case into (1) a proceeding to determine whether the defendant is a principal in the first degree so as to qualify for the death sentence, and (2) a proceeding to determine the sentence which defendant will receive.

Respectfully submitted,

/s/ Michele Nethercott
Michele Nethercott
Assistant Public Defender
500 Virginia Avenue
Towson, Maryland 21204
321-2990

STATE OF MARYLAND
vs.
KEVIN WIGGINS

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
CASE NO. 88 CR 5464

MEMORANDUM IN SUPPORT OF MOTION
FOR BIFURCATED SENTENCING PROCEEDING

Defendant, Kevin Wiggins, by his undersigned counsel, submits this memorandum in support of his motion for a bifurcated sentencing proceeding.

Introduction

Defendant, Kevin Wiggins, was convicted following a Court trial presided over by the Honorable J. William Hinkel of the first degree murder of Florence G. Lacs on August 4, 1989. Sentencing has been scheduled to commence on October 10, 1989.

Argument

Capital sentencing proceedings involve two distinct stages. First, under Article 27, Sections 412 and 413 of the Maryland Code (1957, 1986 Repl. Vol.), the State must prove beyond a reasonable doubt that the defendant was a principal in the first degree murder of which he has been convicted. *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983). A first degree principal is the immediate perpetrator of the crime who either by his own hand, or through the agency of some means, causes the death of another. *Bowers v. State*, 306 Md. 120, 507 A.2d 1072 (1986) (construing Maryland Code Article 27, Section 413(e)(1) [1957, 1982 Repl. Vol.]). In addition, Section (f) of Article 27, Section 413 specifies that prior to any consideration of mitigating evidence that sentencer must be persuaded beyond a reasonable doubt of the existence of an aggravating

circumstance.

If the trier of fact finds that the defendant was a principal in the first degree and finds the existence of an aggravating factor, the sentencer is then directed to weigh any aggravating circumstances established by the defendant against the aggravating factor. If the trier of fact finds by a preponderance of the evidence that the aggravating circumstances outweigh the mitigating circumstances, the sentencer is then authorized to impose the death penalty. See *Stebbing v. State*, 299 Md. 331, 473 A.2d 903 (1984); *Calhoun v. State*, 297 Md. 563, 468 A.2d 45 (1983).

A sentencing hearing that simultaneously tries the issues of principalship and mitigation/aggravation will result in the admission of evidence with respect to the latter issues which is inadmissible as to the former. Highly prejudicial evidence such as prior criminal convictions and information about the defendant's background and character which may be admissible in certain circumstances to prove aggravating circumstances or disprove mitigating circumstances[1], should not be admitted to prove that the defendant was a principal in the first degree. See *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980) (evidence of other crimes not admissible to show that defendant committed the charged offense. If the jury is exposed to this evidence prior to their determination of principalship, the resulting prejudice will violate Mr. Wiggins' right to a fair trial.

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[1]In the sentencing phase of a death penalty case, evidence of prior convictions, pleas of guilty and pleas of nolo contendere to crimes of violence might be admissable. Maryland Code, Article 27, Section 413(c)(1)(iii) (1957, 1986 Repl. Vol.). See also *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983).

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and Articles 21 and 24 of the Maryland Declaration of Rights, guarantee all citizens due process of the law, and a full and fair trial by an impartial jury of their peers.[2] Fairness is a concept which is inherent in the Constitutional right of due process. *Massey v. Moore*, 348 U.S. 105, 99 L.Ed. 135, 75 S. Ct. 145 (1954). Failure to observe fundamental fairness deprives a defendant of due process, which is at the heart of the justice system. See *Lisenba v. California*, 314 U.S. 219, 86 L.Ed. 166, 62 S. Ct. 280 *reh. den.* 315 U.S. 826, 86 L.Ed. 1222, 62 S. Ct. 620 (1942). In addition, Article 25 of the Maryland Declaration of Rights and the Eighth Amendment of the United States Constitution require that Mr. Wiggins be afforded a capital sentencing proceeding that produces a reliable verdict free of the influence of improper and arbitrary factors.

The principalship phase of the sentencing hearing is procedurally and substantively similar to the guilt-innocence phase of a capital trial. The standard of proof, guilt beyond a reasonable doubt, is the same standard that the State must meet during the guilt-innocence phase. Traditional rules of evidence must be followed in both stages to exclude hearsay and equally unreliable evidence, including evidence of the defendant's prior criminal record and evidence of his character. See *Tichnell v. State*, 287 Md. 695, 415 A.2d 830 (1980).[3]

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[2]A fundamental right guaranteed by the Fourteenth Amendment is the right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S. Ct. 896, 904, 43 L.Ed. 2d 103 (1975).

[3]In non-capital cases, all the substantive issues involving the guilt or innocence of the the defendant are examined in the guilt stage of the trial. Strict adherence to evidentiary rules is unnecessary in a regular sentencing hearing because the defendant is no longer at risk from the admission of

The aggravation/mitigation phase of the capital sentencing hearing contrasts sharply with the principalship phase. During the aggravation/mitigation phase of the sentencing hearing, the jury is permitted to consider all relevant evidence. In the case at bar, the State may attempt to introduce evidence of the defendant's background and character. Without bifurcation, this evidence, which would not be admissible to prove that Mr. Wiggins was the principal in the murder of Florence Lacs, will be heard by the jury before they determine principalship.

Cautionary instructions to a jury to ignore the evidence admitted regarding aggravation and mitigation when determining principalship cannot possibly protect Mr. Wiggins from the jury's subconscious use of the inadmissible and prejudicial evidence. Jurors cannot realistically be expected to ignore evidence presented by the State in aggravation when they consider whether the defendant was a first degree principal. Fair consideration of the principalship issue by the jury necessitates a trial on the issue of principalship untainted by inadmissible hearsay and irreparably prejudicial evidence. Failure to bifurcate this capital sentencing hearing will violate Mr. Wiggins' rights to due process and a fair and impartial trial.

Jurors in a capital sentencing proceeding must be guided by objective standards but a unitary proceeding which intermingles discrete classes of evidence and burdens of proof serves only to confuse jurors and risks an erroneous arbitrary imposition of a death sentence. See *Mills v. Maryland*, 486 U.S. ___, 100 L.Ed. 2d 384 (1988).

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prejudicial evidence. See *Smith v. State*, 308 Md. 162, 517 A.2d 1081 (1986).

In addition to Constitutional guarantees, the Maryland death penalty statute also requires a bifurcated sentencing hearing. Maryland Code, Article 27, Section 413(e)(i) (1957, 1986 Repl. Vol.) states that a defendant must be guilty of murder as a principal in the first degree *before* subjecting that defendant to a death penalty sentencing proceeding. Section 413(a) states,

> If a *person* is found guilty of murder in the first degree, . . . , a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death. (emphasis added)

Section 413(e)(i) defines the terms "defendant" and "person" as being a principal in the first degree.

The statutory language clearly means that a person can be subject to a death penalty sentencing hearing only after he is found to be a principal in the first degree. Attempting to satisfy this requirement later in the sentencing proceeding by allowing the jury to consider evidence which would not have been admissible at the trial would violate the statute. *Colvin v. State*, 314 Md. 1, 548 A.2d 506 (1988) (Blackwell, J., dissenting).

In a variety of settings, bifurcation has been recognized as a legitimate and convenient method of insuring a fair proceeding. Under Maryland Rule 2-503(b) governing civil actions, the Court may, on motion from counsel or on its own initiative, order a separate trial of any issue or claim. The Court of Appeals has recently endorsed this procedure with respect to the defense of insanity in a criminal case. *Treece v. State*, 313

Md. 665, 547 A.2d 1054, 1064 (1988).[4] On July 17, 1989, the Honorable James Sfekas granted a defense motion for a bifurcated proceeding on the issue of principalship in the case of *State v. Jones*, CR 843998.

The bifurcated sentencing proceeding proposed by the defendant will not prejudice the State or encumber the proceeding. The jurors would first hear all the relevant, admissible evidence on the first degree principalship issue, at which time the State may attempt to prove beyond a reasonable doubt the principal involvement of Mr. Wiggins. If the jury determines that the defendant was a principal in the first degree of the murder of Florence Lacs, the State may then present relevant and admissible evidence to attempt to prove beyond a reasonable doubt the existence of aggravating factors. After weighing the evidence of aggravation and mitigation, the jury will be able to render a fair and impartial judgment free of irrelevant and prejudicial evidence.

The bifurcated sentencing proceeding may also serve to reduce the length and complexity of the trial in this case. If the jury concludes that the defendant is not guilty of principalship, the proceeding will be concluded since a death sentence cannot be imposed in those circumstances. Employing a bifurcated proceeding presents no prejudice to the State.

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[4]In response to the Court of Appeals decision in *Treece v. State*, 313 Md. 665, 547 A.2d 1054 (1988), the Standing Committee on Rules of Practice and Procedure proposed a new Rule 4-314. The proposed rule entitles the Defendant or the State to request a bifurcated trial, under certain circumstances, where the issue of criminal responsibility will be determined separately from the issue of guilt. 16 Md. Reg. 620 (March 10, 1989).

Conclusion

In a capital case, the severity of the potential punishment warrants precautionary measures above and beyond those employed under other circumstances. A bifurcated sentencing proceeding is the only means to protect a defendant's constitutional rights. Furthermore, Article 27, Section 413(e) of the Maryland Code requires bifurcation of this proceeding.

Bifurcation serves the interest of justice in a fair trial. It is neither unduly burdensome to the Court nor unfairly prejudicial to the State. Defendant's motion should be granted.

Respectfully submitted,

/s/ Michele Nethercott
Michele Nethercott
Assistant Public Defender
500 Virginia Avenue

In the Circuit Court for Baltimore County

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
Wednesday, October 11, 1989
Towson, Maryland

Before:
The Honorable J. William Hinkel, Judge

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MS. NETHERCOTT: Your Honor, I think at this point perhaps I would proceed on the defendant's motion for bifurcation, I think might be the next logical.
THE COURT: I have it now.
MS. NETHERCOTT: Your Honor, I think all the contentions with regard to this are pretty comprehensively outlined in the motion. Just like to clarify for the record that it's the defense position that bifurcation is entirely consistent with the statutory language. Statutory language says that, before consideration of the mitigating and aggravating factors, that the fact finder must be convinced beyond a reasonable doubt with regard to both principalship and proof of the aggravating circumstance.
I also believe that under Maryland law the

evidence admissible as to that phase of the proceeding would be that the State would be bound by the same rules of evidence that they would be in the guilt/innocence phase. The problem with not having

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a bifurcated proceeding is that, essentially, the State is able to get in evidence that would come in at another section of this proceeding where other types of evidence would be admissible, such as hearsay evidence, a Pre-Sentence Investigation Report, evidence of that nature, which is not only not relevant to the determination the jury must make on principal and the aggravating factor, but the real problem from the defense standpoint, and the specific factual situations presented by this case, is that it's prejudicial and therefore it's violating not only the Declaration of Rights and Maryland law, I believe it poses a problem in terms of federal constitutional law, specifically Mr. Wiggins' right not to have this determination affected by any random or arbitrary factors, factors that are not intended to be considered by the fact-finder with regard to the principalship and the findings as to the aggravating factor.
To be very specific about it, Your Honor, in this case I can proffer to the Court that, in a non-bifurcated proceeding, the defense is in a position of coming forward with evidence regarding psychological history on Mr. Wiggins, including aspects of his life history, including a diagnosis

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of a personality disorder, including diagnosis of some retardation.
The problem, Your Honor, is that all of that evidence which is relevant to mitigation in both a statutory and non-statutory sense is not relevant at all on the issue of principalship. And the danger is, if the jury hears all of this, that they're going to use that evidence in coming to a conclusion with respect to principalship and coming to a conclusion with respect to proof on the aggravating factor.
Furthermore, we have the additional problem that, even if the defense does not raise issues such as future dangerousness, apparently under Maryland law the State is free to do that.
Therefore, we have not only our own evidence which is going to essentially put us in a position where our mitigating factors can turn into aggravating factors, I think that that is a discrete constitutional problem that was addressed in Zant v. Stephens, that there's a federal constitutional prohibition against the use of mitigating factors as aggravating factors and also the use of factors such as the defendant's exercise of his right to trial, his exercise of his right to remain silent, as being

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used against him as some kind of aggravating factor. That's a situation that's presented here.
I submit that that problem is easily cured by a bifurcated proceeding. And I would submit it's

entirely consistent with the statutory language. It's the best way to insure protection against all of the dangers I outlined here. Finally, Your Honor, I would submit it's in the interests of judicial economy. If the fact finder is not convinced that the State has proven principalship, that ends the proceeding, rather than having us here for hours or perhaps days discussing evidence that isn't really relevant to that at all.

THE COURT: You would only bifurcate on the issue of whether the defendant was a principal in the first degree in murder and not the aggravating circumstance of whether there was a murder committed in the course of a robbery? It would seem to me that if you're going to bifurcate, that those two ought to be together.

MS. NETHERCOTT: Court's indulgence for a second, Your Honor. Your Honor, the factual context of this case, we want to bifurcate the case on the principalship issue. One proceeding to determine that, separate proceeding --

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THE COURT: Principal to the murder, first degree murder. And what evidence would come in on that issue?

MS. NETHERCOTT: With regard to the principalship issue?

THE COURT: Yes. In this first stage, this first phase of the proceeding?

MS. NETHERCOTT: Well, whatever evidence the State intends to prove that proposition.

THE COURT: And wouldn't all the evidence

concerning whether there was a robbery come in?

MS. NETHERCOTT: Yeah, I think in this factual context, it would.

THE COURT: Then why shouldn't that evidence all go to the jury at one time so that they can answer both questions? One is the principalship, and if they answer yes to principalship, then they go on to question two as to whether or not the aggravating circumstances there are proven beyond a reasonable doubt, before you get to the part that you say is prejudicial to your client, Mr. Wiggins.

Otherwise, if you present only the principal in the first degree question and admit all the evidence concerning the robbery would have to

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come, whatever evidence concerning the robbery would have to come in, then the State would be obliged in phase two to reintroduce or put on that same evidence again to prove the aggravating circumstance.

MS. NETHERCOTT: Right. If I understand what the Court is saying.

THE COURT: What I'm trying to say is I don't see any harm to your client.

MS. NETHERCOTT: Three bifurcations as opposed to two bifurcations?

THE COURT: No. You want to take this, you want to sever it right after question one. I'm suggesting to you, if you do it that way, I don't know that I've decided to do that -- I'm going to hear from the State -- but if you decide to do that,

the evidence presented in that phase also has to be re-presented because it has to do with the aggravating circumstance.
If you put principalship and aggravating circumstance in the first phase, the same evidence is presented as if you didn't include the two. What harm or what would be done in that phase, including both of them, that would be detrimental or harmful to your client?

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MS. NETHERCOTT: Well, I think, Your Honor, that quite frankly in this case I wouldn't object to one proceeding for principalship and existence of the aggravating factor are determined.
THE COURT: As phase one?
MS. NETHERCOTT: As phase one.
THE COURT: And if you get two yes answers, you move to phase two. Otherwise you would go --
MS. NETHERCOTT: Right. My objection is the intermingling of this other evidence regarding mitigation and aggravation.
THE COURT: Well, that's what I thought it was. Let me hear from Ms. Brobst.
MS. BROBST: I have two problems. The first is that we don't have any statutory or case authority for this. And I see this as becoming an absolute procedural nightmare.
Does the State then get two openings in which first we argue, we tell them that we're going to prove the principal and that the murder was committed in the course of a robbery? Then after we

get a ruling on that, do we stand up and tell them about the weighing process? Because I could see an objection to that because now the State's had two

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openings.
Two things. First of all, the rule and statute to me, and not to Ms. Nethercott, are fairly clear that this is done at one time. And I mean, this is the law that we have and that we're instructed to follow.
The other thing is, to me there comes a point in time when you have to assume the jury's going to do what they're instructed to do. We assume that all the time when we take cases to juries. And they will, I assume, be instructed that you have to first consider whether he's a principal in the first degree, and answer that. Then go to the next step, which is what the rule lays out.
Although I understand her factual argument, we just don't have any legal authority for that at all. I think we would be in a bad way if we tried to figure that all out, because we have no instruction. The instruction we have is to the contrary.
THE COURT: Cases are bifurcated fairly often. I mean, it's not done every day, but there is some guidance on how to do it. Admittedly, I'm only aware of Judge Sfekas having granted the request to bifurcate.

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MS. BROBST: And the only other area that comes immediately to mind is in the area of insanity. But when that happens, we've got rules on it. We've got law. We've got instructions. And we don't have those here.
Additionally, Your Honor, now we have the issue which is attendant to the statutory scheme as we have it of defendant's allocution.
Now, that doesn't fit into the suggested bifurcated proceeding. Would he have a right to allocute as to principal and aggravating circumstance and then re-allocute?
THE COURT: Look, any time you tamper with a statute --
MS. NETHERCOTT: There's always a first.
THE COURT: Very, very difficult. My question to you is the same as to Ms. Nethercott. If a bifurcation is to be granted, does it make sense to do principal and the aggravating circumstance together, as I said to Ms. Nethercott? I'm not suggesting that's the way I'm going to rule on it. But I was saying that before I even heard the State's position. Let me hear a response.
MS. BROBST: If you're asking me whether I

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think it makes sense, I think it would make sense to proceed on the issue of principal first and aggravating because those are questions dealing with the crime in a kind of vague way as opposed to

questions dealing with the defendant, which are the mitigating circumstances in the weighing process. However, if the Court is inclined to grant a bifurcated proceeding, the State would request it do so in the way requested by the defense, because then I don't think we're going to have an objection from the defense and then we won't have as many problems should the case be appealed later on this issue.
THE COURT: Okay. Ms. Nethercott, anything else?
MS. NETHERCOTT: No, Your Honor, other than just the, I'm sure it's clear. But the other problem with the non-bifurcated proceedings, that we're mixing different evidentiary standards. As much as it may present procedural problems, I think that in a case of this magnitude, I think that has to go to the protection of Mr. Wiggins.
THE COURT: I'm thinking about it. I'm not going to rule right now. I'm thinking about whether I'll bifurcate.

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Did I understand you to say that you had no objection if the two were put together, that is the aggravating and the principal questions?
MS. NETHERCOTT: I believe that is my position. If the Court can indulge me for one moment, I'll make sure that it's both our positions. Thank you, Your Honor. My position is that we would be happy with a ruling that bifurcates on the principalship, that would not require the State to remove the aggravater.

THE COURT: That you're saying that the
first two questions --
MS. NETHERCOTT: Right.
THE COURT: -- as to the principalship
question and the aggravating circumstance question
be submitted in phase one of a bifurcated
proceeding. And the State opposes that, is that
correct?
MS. BROBST: The State is opposed to that,
yes, Your Honor, in principle. However, if the
Court is inclined to grant that, we would request it
be granted in the way the defense requests, if you
follow me.
MS. COFFIN: Which she has just agreed to.
MS. BROBST: Right.

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In the Circuit Court for Baltimore County

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Reporter's Official Transcript of Proceedings
Thursday, October 12, 1989
Towson, Maryland

Before:
The Honorable J. William Hinkel, Judge

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[THE COURT]
Mr. Kevin Wiggins, who is seated at trial
table, has been found guilty of the murder of
Florence Lacs in the first degree and the robbery of
Florence Lacs. The jury selected to hear this case
will be asked to decide whether Kevin Wiggins should
be sentenced to death or imprisonment for life
without the the possibility of parole or
imprisonment for life with the possibility of
parole.

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[THE COURT]
The State's Attorney's Office has filed a
notice of intention to seek the death penalty in
this case. The jury will determine the appropriate

sentence in this case.
One, many people feel strongly about the
death penalty. Some feel that the death penalty
should be imposed in every case of first degree
murder regardless of the facts and circumstances.
Others feel that the death penalty should never be
imposed regardless of the facts and circumstances.
Do you have any strong feelings one way or the
others?
Two, would your feelings about the death
penalty prevent you from sentencing the defendant in
accordance with the sentence -- excuse me -- in
accordance with the evidence and the law?
Three, after listening to the evidence and
applying the law, if you were convinced that the
appropriate sentence should be death, would you be
able to vote for the death penalty?
Four, on the other hand, after listening
to the evidence and applying the law, if you were
not convinced the appropriate sentence should be
death, would you vote for life imprisonment?

* * * *

In the Circuit Court for Baltimore County

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins,
Defendant

Report's Official Transcript of Proceedings
Friday, October 13, 1989
Towson, Maryland

Before:
The Honorable J. William Hinkel, Judge and a Jury

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MS. BROBST: Thank you, Your Honor. May
it please the Court, I would like to welcome you all
back and also take an opportunity to thank you very
much for your patience with us yesterday during a
very arduous voir dire process.
Additionally, I would like to thank you on
behalf of myself, Ms. Coffin, and the defense
attorneys in this case for agreeing to take on this
very serious decision. I know it's going to be a
difficult one for you to make and we appreciate your

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time, your patience and your attention.
I would like to talk for a moment about
why we're all here. We're here because of Florence
Lacs. Mrs. Lacs was 76 years old. She was widowed,

lived alone in the Clark Manor Apartments. She lived in Apartment Number 1951-C, Woodlawn Drive, which is in the Woodlawn section of Baltimore County.

Mrs. Lacs was a very active lady. She had a close circle of friends. She enjoyed playing cards with them. They would get together for lunch. And she was a member of the Senior Citizens Group. But Mrs. Lacs was not given an opportunity to live out her life in peace and tranquility as we would expect one should in their golden years because Mrs. Lacs died at the hands of the defendant, Kevin Wiggins --

THE DEFENDANT: I'm not going to take that because I didn't kill that lady. I'm not going to sit there and take that. I didn't kill that lady. I'm not going to sit there and take that.

THE COURT: Go ahead, Ms. Brobst.

MS. BROBST: -- who entered her home and brutally murdered her by drowning her in her own tub during the robbery of her property. He left her,

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exposed and humiliated, And as a final act of humiliation, he dumped her, sprayed Black Flag insect repellent on her body. He left her with her skirt hiked up around her waist and without any underpants on. Then he took from her a few precious valuables which she had been able to accumulate during her long life -- four credit cards, which Mrs. Lacs herself rarely used, a Citgo card, a Hecht Company card, a Sears credit card, and a J.C. Penney card.

He took her car keys because Mrs. Lacs still drove. She drove a little, 1980 orangey-red, kind of a tomato-red Chevette. He took her keys with their letter F key holder. And he also took from her her engagement ring which she kept in the jewelry box on her bureau in her bedroom. He dumped out her purse on her bed and ransacked every inch of that apartment, taking out drawers and dumping them on the sofa, pulling off the sheets of the bed to take anything of value which he could find. And then he left.

Now, members of the jury, the defendant has already been convicted of that murder beyond a reasonable doubt. He's been convicted of the robbery. And it will be your job to determine what

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is the appropriate sentence for him to receive as a result of his actions on that day.

Now, let's start at the beginning. Before I do that, let me just tell you that I know you're all legitimately concerned about this decision you're going to have to make. But you're not going to have to make it in a vacuum. You will be given a form to fill out that will explain to you certain criteria which must be met for a penalty of death. You will have that form and you will be able to take that back with you to the jury room during your deliberations.

You will also have an opportunity to take all the evidence which the State and the defense, if it chooses, introduces, the physical evidence will go back with you. You won't have to recall it.

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17 You'll have it with you.
18 The judge will give you instructions on
19 exactly what you're supposed to do and how you're
20 going to apply the evidence that you hear in
21 determining the appropriate sentence. He'll tell
22 you that the State must first prove to you two
23 things beyond a reasonable doubt. One is that the
24 defendant was a principal in the first degree, which
25 means that by his hand Mrs. Lacs was killed, that he

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1 is the person whose actions caused her death.
2 Additionally, you will have to find beyond a
3 reasonable doubt that this murder occurred in the
4 course of the robbery, and you will receive
5 complicated and detailed instructions on that before
6 you're asked to make this decision.
7 When you find that those two things exist,
8 then you will go on to consider certain mitigating
9 circumstances that will be presented to you. Some
10 of those are called statutory mitigating
11 circumstances. Those will all be listed on the
12 form. One of those statutory mitigating
13 circumstances, the State concedes. We're telling
14 you right now it exists. And that is that the
15 defendant has not previously been convicted of a
16 crime of violence as defined by statute. So that
17 one you will have, that mitigating circumstance, and
18 it will be premarked for you. The rest you'll go on
19 to consider. You'll weigh the evidence. You will
20 decide whether those exist.
21 The defense also has a right to present
22 certain, what we call, non-statutory mitigating

23 circumstances. Those are things which you may
24 decide to weigh also in your, in your
25 deliberations. But those are things which is a

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1 two-step process. One you will decide, does it
2 exist, has it been proven by the defense by a
3 preponderance of the evidence, and two, is it
4 mitigating? Does this make a difference to me? Do
5 I think that this lessens his guilt?
6 After you have had an opportunity to
7 compile all this information, you will be asked --
8 MR. SCHLAICH: Your Honor, I note an
9 objection. May we approach the bench?
10 THE COURT: Yes.
11 (Counsel and defendant approached the
12 bench and the following ensued:)
13 MR. SCHLAICH: Your Honor, the State's
14 Attorney has incorrectly stated that mitigators go
15 to determining if it lessens the defendant's guilt.
16 THE COURT: You did say that. Do you want
17 to explain that to them?
18 MS. BROBST: Okay.
19 THE COURT: Back up.
20 MS. BROBST: Okay. Now, what's your
21 objection?
22 THE COURT: You said is it goes to lessen
23 his guilt.
24 MS. BROBST: I'm sorry. Okay.
25 (Counsel and defendant returned to trial

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tables.
MS. BROBST: Thank you, Mr. Schlaich. Mr. Schlaich pointed out that I misspoke. The mitigating factors would not go to lessening the defendant's guilt. He's been found guilty beyond a reasonable doubt. What I meant to say is that they would affect you in what sentence you should impose. And I misspoke and I thank Mr. Schlaich for his correction on that.
As I say, you would have to determine two things on the non-statutory mitigating circumstances and then you would weigh the aggravating circumstance and the principalship in the first degree against those mitigating circumstances. And if you're convinced by a preponderance of the evidence that the aggravating circumstance outweighs those mitigating circumstances which you or any one of you have found to exist, then the sentence in this case will be death.
As I say, all these things will be reiterated to you again at the end of the evidence.
Now, I'd like to talk to you about the State's case and what we're going to prove to you over the course of probably the next day, maybe day and a half.

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As I said, Mrs. Lacs lived at the Clark Manor Apartments in Woodlawn, 1951 Apartment C.
Now, you'll need to know and you'll see some photographs and a chart of this. But this is the

kind of entry level of this apartment building and on that level are C and, Apartments C, F and E.
Now on the 13th of September, 1988 --
she's killed on the 15th. On the 13th, the defendant, Mr. Wiggins, who used to live at the Clark Manor Apartments, shows up at the Clark Manor Apartments where he meets a Joseph Weinberg. Now, Joseph and his brother, Robert, are subcontractors who at the time were working in the Clark Manor Apartments doing some painting and sheet rock. And he asks and they offer him a job.
So he proceeds to start working for the Weinberg brothers. That's on September 13th. Now, on the 15th, the day, the last day that Mrs. Lacs had on this earth, the defendant, for some period of time, is working in Apartment F, the empty apartment right across from Mrs. Lacs' apartment, and he's in there for some period of time alone.
Then later that morning, he and Robert Weinberg are loading some sheet rock on to a truck.
Well, Mrs. Lacs' apartment overlooks the parking lot

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where they're loading the sheet rock and she peeks out the window and she sees that the truck is parked near her car. Well, Mrs. Lacs was concerned because she had planned to go to a Senior Citizens meeting that day and she had planned to do the driving. She was going to pick up her friends.
She couldn't tell whether the truck was blocking her car, so she calls out. Well, Mr. Weinberg doesn't hear her call out but the defendant does. And the defendant motions to Robert and says,

11 that lady's trying to get your attention. So they
12 both look up at Mrs. Lacs and she says, can I still
13 move my car, this orangey-red Chevette, and they
14 assure her that, yes, in fact, she can.
15 So at 10:30 that evening, she gets in her
16 Chevette and she goes to pick up two friends,
17 Genevieve Frank and Delores Elgert. She takes them
18 with her to the Senior Citizens meeting. They have
19 some lunch. After lunch, they stay around, they
20 play some cards and they're joking around and she
21 drives them home. She drops off Mrs. Elgert at
22 about 4:00.
23 The next thing that you will hear, the
24 next witness you will hear from is little Chianti
25 Thomas. She's a little girl who was visiting a

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1 friend in Apartment E at 1951 Woodlawn Drive. She
2 and her friend were leaving and they couldn't get
3 the door locked on Apartment E. Well, they knew
4 Miss Florence, as they refer to her, and they went
5 to her door to ask her if they could help her lock
6 the door -- they had done this before. And at that
7 time they see and hear a conversation between the
8 defendant and Mrs. Lacs and the defendant says,
9 thank you for watching my sheet rock for me. And
10 Mrs. Lacs says to the defendant, see, I told you
11 nothing would happen if you had me watch it.
12 Well, then Chianti gets her situation with
13 the lock straightened out and she leaves.
14 Well, at that time, ladies and gentlemen,
15 is when Mrs. Lacs was attacked by the defendant.
16 That's when he entered her apartment. There's no

17 signs of forced entry. That's when he ransacked.
18 That's when he killed her and that's when he dumped
19 the Black Flag insect repellent on her. And that's
20 when he stole her property and left.
21 Now, we know that in a number of ways, all
22 of which will become clear to you from the evidence
23 which you'll hear. But one of the ways is from a
24 witness named Geraldine Armstrong who was, at the
25 time, the girlfriend of the defendant, Kevin

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1 Wiggins, and who bears him no animosity. In fact,
2 they still write and visit.
3 And she says that she got home from work
4 -- she works at Social Security over in Woodlawn --
5 she got home from work at about 7, sometime a little
6 after 7, when the defendant comes over. Well, he is
7 driving an orangish-red Chevette, a car which she's
8 never seen before. So she says to him, where did
9 you get the car? He says, a friend gave it to me,
10 lent to to me, he says. Okay.
11 He says, would you like to go shopping?
12 Well, of course she leaves, she gets everything at
13 home squared away, and off they go to the Hecht
14 Company in Security Square Mall. And the defendant
15 has Geraldine Armstrong sign the name Florence Lacs
16 to credit card receipts in the Hecht Company. And
17 at 8:57 p.m., you will hear, they charge a
18 herringbone chain, value of $328; at 9:14 p.m., they
19 charge at the Lady's Sportswear Department, some
20 articles of clothing; and at 9:19 p.m., they charge
21 one Swatch watch. All the time, Mrs. Armstrong
22 signs the name of Florence Lacs. Then she says to

the defendant, I got to get going because I have to get home.
Well, she says to him, whose credit card

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is this? And he says, oh, it's either a cousin or an aunt of mine and don't worry, she said we can use it, it's okay.
So he takes her home and they arrange for him to pick her up to take her to work the next day at Social Security. So he shows up and at that time Mrs. Armstrong says to him, I don't feel well, I may have to leave work early today so I'll call you where you're working at the Clark Manor Apartments and let you know.
So as it comes to pass, he does pick her up early. He picks her up around noon and they leave. But she doesn't feel so sick that the two of them don't go shopping again. They again go to the Hecht Company. They go to the Penney's to the Fine Jewelry Department and they go out to Columbia Mall and charge some things at the Sears.
An interesting thing happens at the Penney's Fine Jewelry Department. They are such good customers that a Jeanetta Washington gives the defendant her card, her business card, because he's charging a lot of property. And because they purchased a diamond, she says, we're going to fill out a diamond certificate. You get a certificate when you purchase a diamond here.

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So she says to the defendant, what's your address, and he says 1951 Walnut Avenue. Now, this becomes important later because you will learn that the address the defendant was giving at the time was not 1951 Walnut Avenue -- 1951 being the address where the victim was killed. He lived at the time at 1013 Walnut Avenue, but the 1951 was on his mind when he filled out this diamond certificate.
The police, of course, have been everywhere for the people who are responsible for this crime and, of course, they have a bulletin out about the Chevette, the orangey-red Chevette. And they also have information that the credit cards are being used.
Well, Sergeant O'Neill is coming back from a full shift and he's coming down Windsor Mill Boulevard to go back to the station, Woodlawn Station, and leave for the day. And he's with another detective, Detective Coburn. And they look in front of them and they say, that's the car, that's the car everyone's been looking for. This is on September 21st.
So on September 21st, the car is stopped by Sergeant O'Neill and Detective Coburn. In the car is the defendant, Geraldine Armstrong, and their

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infant, their baby girl. He's taken from the car and he is held until homicide detectives can arrive.
Detective Crabbs arrives. Detective

Crabbs gives the defendant his rights pursuant to the Miranda warning and the defendant gives a statement. He gives a statement that will convince you beyond a reasonable doubt that he is the person responsible for this crime because he knows exactly what happened and he has an answer for everything. He says that he found the car on the Roy Rogers parking lot but he insists that he didn't find it until Friday, the 16th of December, of September, 1988, the day after she was killed. He says that he found the ring. He says that he found the credit cards, and he says that he did lie to Geraldine because he didn't want her to know, which is why he explained that he got these things from his aunt.

Additionally, the Crime Lab, who did the investigation at Mrs. Lacs' apartment after her death, did a thorough investigation and, of course, pursuant to that dusted for prints. They were unable to find any prints of the defendant. They did find some surfaces with smears on it.

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When the defendant is returned to Headquarters, he's patted down before he's put in a cell and they reach into his pocket, which is a customary procedure, and they find --

MR. SCHLAICH: Objection.

THE COURT: Overruled.

MS. BROBST: -- and they find in his pocket a plastic glove which they take and keep as evidence and which will also be introduced to you.

Ladies and gentlemen, after the State

presents its case to you, and we will also be presenting a pre-sentence investigation which gives you some background on the defendant, and the defense presents its case in mitigation, we're confident that you will weigh the evidence and return with the verdict of guilty of -- I'm sorry -- return with a sentence of death.

Thank you very much.

* * * *

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MS. NETHERCOTT: Your Honor, counsel for the State, Kevin, ladies and gentlemen of the jury, first of all, I also would like to thank you for your patience and ask for your indulgence with me if I sometimes refer to my notes. Generally try not to do that, but as you can imagine, it's a very serious

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proceeding and I don't want to miss anything that I would like to discuss with you at this point. This will probably be the only opportunity I have to speak directly with you. As you know, my name is Michelle Nethercott and I, along with Carl Schlaich, represent Kevin Wiggins in this proceeding.

I'd like to start discussing with you the decision that you must make in this case. You have heard from the State and you have been instructed by the judge that there is a guilty verdict in this case and, obviously, you are bound by that verdict. Just to clear up any confusion about that, that verdict stands. You as the jury have no power

to alter that verdict. Even if you heard all the
evidence in this case and you went back into the
jury room and you concluded that Kevin Wiggins
wasn't guilty of the murder, you have no power to do
anything about that. He has been found guilty of
first degree murder. That verdict is a fact and
it's a fact which means that Kevin Wiggins will be
punished harshly and immediately.
The decision that you ultimately must
render in this case is, does Kevin Wiggins die in a
gas chamber, does he spend the rest of his life in a

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prison with no possibility of ever being paroled, or
does he spend much of his life in prison with some
possibility, at some point in his life, to be
considered for parole.
Now, each of you is an individual and I'm
sure you can use independent thinking. You probably
know from this process that you've gone through on
voir dire that we're been inquiring into that. We
need your independence because this is a decision
that each of you individually must make. To make
this decision, that Kevin Wiggins should die, each
and every one of you must individually decide that.
I'm going to talk with you about the
evidence in this case, but before I do that, I would
like to talk with you a little bit about the law
because it's very important to understand what the
law is and how it applies here.
I'm sure all of you know the death penalty
is very controversial. People have strong feelings
about it, both for it and against it. And the law

has not escaped this controversy. There has been a
struggle in our law for many years in this country
about whether to have it, and if we have it, how,
and who does it apply to. The outcome of that
struggle in the law has been this. Our courts, from

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the Supreme Court to our Maryland courts, have
consistently said that there is nothing illegal
about having a death penalty, it's fine and it is
appropriate in certain circumstances. The law has
further said that those circumstances have to be
clearly defined.
What the law says is, first of all, the
law must only apply to a very small, select group of
offenders, the worse offenders, in fact the worst
murderers. Secondly, obviously the law must be
concerned with procedures that insure that only
those people, in fact, guilty of having committed
the crime are sentenced to death. And in Maryland,
you must specifically make a finding that the State
has proved beyond a reasonable doubt that Kevin
Wiggins caused the death of Florence Lacs. That's
something that is referred to as principal in the
first degree. You may hear reference to it. That's
what it means, ladies and gentlemen.
The other thing the law has become very
clear about is that you cannot have what's called a
mandatory death penalty. What that means, quite
simply, is that there is no crime bad enough in and
of itself as to require an automatic imposition of
the death penalty. Courts have been very clear

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about that. That is illegal.
Courts have required that, in making a
sentencing decision, you as sentencers consider not
only the facts of the crime, what a person is found
to have done, but also you must consider who that
person is.
The State must first prove, before you
even consider these things called mitigating
factors, and I'll get to that in a minute. But the
first thing the State must prove is that Kevin
Wiggins caused the death of Florence Lacs. The
evidence won't prove that.
You must consider, when you hear the term
"aggravating factor", that is that special
circumstance which the law allows provides for the
imposition of the death penalty. Aggravating factor
is a very cleaned up, legal term. What it means,
quite simply, is a reason to kill. Mitigating
factors are reasons not to kill Kevin Wiggins. They
are not excuses, ladies and gentlemen. I wouldn't
stand before you and offer you an excuse in this
matter. They are reasons not to kill.
The evidence that you will hear has been
summarized, I think quite well, by the prosecutor.
I ask you, as you hear this evidence, to consider

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certain things; to look out for certain things.
First of all, it's going to be very
important that you listen very closely to this
evidence because detail's important in this case.

You will hear some complicated medical testimony and
I ask you, bear with us all and try to keep track of
this as it comes in. Dates are going to be
important in this case.
You won't hear in this case from any
eyewitnesses who saw Kevin Wiggins kill Florence
Lacs. You won't hear from any eyewitnesses who will
say that they saw Kevin Wiggins enter her
apartment. You will hear some scientific evidence.
You will hear about fingerprints and you will hear
they were not Mr. Wiggins.
You will hear that he was in possession of
things that belonged to Ms. Lacs on a Thursday, the
15th of September, 1988, and you will further hear
evidence that Florence Lacs was alive the next day.
You will hear testimony from one of her
friends that she spoke to her on the telephone, and
you will hear detailed medical testimony that
doctors specializing in issues relating to
determining how the way and the time that death
occurred will conclude that the medical evidence

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also is clear, that she was alive that day.
After you have heard that evidence, I
believe you will agree that the State has not proved
what it must prove before you are even in a position
to go on and consider these mitigating circumstances
or reasons not to kill Kevin Wiggins.
You've heard from the prosecutor -- Kevin
Wiggins has no prior convictions for crimes of
violence, and that's indeed true. The judge will
instruct you that you must consider that as a reason

not to kill him.
You're going to hear that Kevin Wiggins
has had a difficult life. It has not been easy for
him. But he's worked. He's tried to be a
productive citizen, and he's reached the age of 27
with no convictions for prior crimes of violence and
no convictions, period. This is not a man who spent
his life in and out of prison doing one thing after
another. I think that's an important thing for you
to consider.
I thank you for your patience. I give you
my best wishes as you embark on this difficult and
profound task. I submit to you that when you have
heard the evidence in this case, that you will have
grave hesitation about a decision to execute based

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on this evidence. Thank you.

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BY MS. COFFIN: [WITNESS: MARY ELGERT]
Q Mrs. Elgert, did you know Florence Lacs?
A Yes, I do. Did.
Q How did you know her?
A I can't hear you very well.
Q Okay. I'm going to come over there with
you.
A I'm deaf in this ear.

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Q How did you know Florence Lacs?
A Oh, she belonged to our Senior Citizens

Club and that's how I came to know her. And she
became a very good friend of mine.
Q I'm going to direct your attention to
Thursday, September 15th, 1988. Do you recall doing
anything with Florence Lacs on that day?
A Well, she came and got me. She always
would come after me and take me down to the Senior
Citizens Club and then she would bring me home.
Q On Thursday?
A On Thursday is our meeting day.
Q The 15th of September?
A Well, every Thursday is our meeting
day.
Q On the 15th, did you and she attend?
A Oh, yeah. It was the 15th, yeah,
Q How long were you at the luncheon?
A From 11:30 until 1. Well, we didn't
leave there until 4. It was a meeting ended 4:00.
Q At 4:00, what did you do?
A She said, come on, let's get ready and
go. And I got ready, went out and got in the car.
Q Who is the she you're referring to?
A Well, she was a very happy-go-lucky

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person and we had a lot of fun together. She was
always thinking of something interesting and telling
you something interesting. She was a person that
was --
MR. SCHLAICH: Objection.
A -- friendly with most everybody --
THE COURT: Overruled.
A -- that I know of.

9 Q Mrs. Lacs drove you home?
10 A Oh, yes. Right to my driveway.
11 Q What time was that?
12 A What?
13 Q What time did she drop you off?
14 A Oh, I guess it was about 10 after 4.
15 Q Did she indicate to you if she was going
16 to do anything else that day?
17 A No. No. No. We just were laughing and
18 talking and she said goodbye, I'll see you soon, and
19 that was it.
20 Q Do you remember what she was wearing
21 that day?
22 A Well, she was wearing a white blouse and
23 a very pretty blue skirt, because I commented on how
24 well she looked. And it was a new skirt. And she
25 thanked me. And she had her hair done and

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1 everything. She looked very nice.
2 Q What color car did Mrs. Lacs have?
3 A Well, I'm not much about cars. But it
4 was a red car and a small one. But I don't know the
5 name of the car.
6 Q Did you ever see Mrs. Lacs again after
7 that day?
8 A No, I didn't.
9 Q Thank you very much, Mrs. Elgert. Now
10 just stay here a moment. These folks may have some
11 questions for you.
12 CROSS EXAMINATION
13 BY MR. SCHLAICH:
14 Q Mrs. Elgert, can you hear me? Can you

15 hear me?
16 A Now I can hear you.
17 Q Now you can hear me. Okay. Maybe I
18 should move closer. The State's Attorney asked you
19 if you ever saw Ms. Lacs again and you said no,
20 right?
21 A No. I didn't.
22 Q Okay. You weren't supposed to see her
23 until the next Thursday when she picked you up?
24 A That's right. Unless she wanted to go
25 somewhere and asked me if I wanted to go.

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1 Q Okay. So you weren't planning to see
2 her for a week, right?
3 A No. No.
4 Q Okay. Now, do you remember giving a
5 statement to the police about this whole incident?
6 A I don't remember giving it to the police
7 in particular. But I made several statements.
8 Q Okay. Now, do you remember telling the
9 people you gave these statements to that Ms. Lacs'
10 new skirt was a light blue skirt?
11 A Yes.
12 Q Yes? Okay. It's not a dark blue like
13 the dark blue in your dress?
14 A No, it was light like that (indicating).
15 Q Okay. You're pointing to the lightest
16 color stripe in your dress?
17 A The lightest color in there, a little
18 bit lighter.
19 Q But not dark like the dark blue stripes
20 on your dress, right?

21 A No, No.

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15 BY MS. BROBST: [WITNESS: CHIANTI THOMAS]
16 Q Can you tell the jury your name?
17 A Chianti Thomas.
18 Q And how old are you, Chianti?
19 A Twelve.
20 Q What's your birthday?
21 A March the 11th, 1977.
22 Q And could you please spell your last
23 name for us?
24 A T-H-O-M-A-S.
25 Q Now, Chianti, I want you to think back,

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1 I want you to think back to September 15th, 1988.
2 Do you remember going to visit a friend that day?
3 A Yes.
4 Q Okay. Where did you go?
5 A I forgot her building number. But her
6 name was Shanita.
7 Q Okay. Do you remember her apartment
8 number?
9 A E.
10 Q And did you go visit Shanita there at
11 Apartment E?
12 A Yes.
13 Q Were you with anybody else?
14 A Yes.
15 Q Who were you with?
16 A Chentell.

17 Q And do you know Chentell's full name?
18 A Chentell Antoinette Greenwood.
19 Q Now, did you go to leave that day at any
20 time?
21 A What do you mean?
22 Q Were you going to leave your friend's
23 apartment that day any time?
24 A Yes.
25 Q And can you tell us what happened when

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1 you went to leave?
2 A We had left and Shanita couldn't get her
3 door locked so she knocked on her next door
4 neighbor, Miss Florence's door, and Miss Florence
5 couldn't get it. And so then this man, the man came
6 upstairs and she said, I told you nobody wouldn't
7 mess with the sheet rock. And he said, thank you.
8 Then Shanita had asked him to do the
9 lock. I told her don't be getting nobody else to
10 lock her door. And then the phone had rung. And
11 Chentell and Shanita had went back in her house
12 because it was Chentell's mother. And then they
13 came back out and we locked the door. And then we
14 went out the building.
15 Q Okay. Now, do you remember making a
16 statement, writing out a statement for the police?
17 A Yes.
18 Q I'm going to show you this.
19 MR. SCHLAICH: Objection.
20 MS. NETHERCOTT: Objection.
21 THE COURT: Sustained at this point.
22 Q When you made the statement to the

23 police, did you tell the truth?
24 MR. SCHLAICH: Objection.
25 THE COURT: If you're using it to refresh

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1 her recollection, you have to find out first whether
2 she has a recollection before you can use it.
3 Q Do you remember today the apartment, the
4 apartment where your friend Shanita lived?
5 A Yes.
6 Q Okay. What was the number of the
7 apartment?
8 A Like E.
9 Q Okay. But how about the number? Do you
10 remember that?
11 A Uh-uh. I forgot.
12 Q Okay. And do you remember making the
13 statement to the police?
14 A Yes.
15 Q And do you recognize this?
16 A Yes.
17 Q And would you look at this and see if it
18 helps you to remember the apartment number? Could
19 you just look at it for me? See if it helps you
20 remember. Do you remember now?
21 A Yes.
22 Q And would you tell us what the apartment
23 number is?
24 A 1951.
25 Q Okay. Now, do you remember when the

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1 detective showed you some pictures?
2 A Yes.
3 Q Can you tell the jury about that?
4 A Detective Crabbs came to Chentell's
5 house and showed us some pictures. He showed
6 Chentell the pictures first and then he showed me.
7 Q Okay. And did Detective Crabbs tell you
8 which picture to pick?
9 A No.
10 Q Did you pick a picture?
11 A Yes.
12 Q And whose picture did you pick?
13 A (Indicating.)
14 MS. NETHERCOTT: Objection.
15 THE COURT: Overruled.
16 Q Indicating, for the record, the
17 defendant.
18 A I know the number.
19 Q Okay. Do you remember what number it
20 was?
21 A Picture two.
22 Q How were you able to pick that picture?
23 A Huh?
24 Q Had you seen the man in picture two
25 before?

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1 A Yes.
2 Q And where had you seen him before?
3 A In Shanita's building.

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19 CROSS EXAMINATION
20 BY MS. NETHERCOTT:
21 Q Chianti, the man that you saw in the
22 hallway --
23 THE COURT: Speak just a little bit louder
24 for the jury.
25 Q The man that you saw in the hallway,

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1 after he talked with Ms. Lacs, he went back in her
2 apartment, right?
3 A (Nods affirmatively.)
4 THE COURT: Chianti, answer so the jury
5 can hear you.
6 A Yes.
7 Q And he left, right?
8 A When I left, he was still in the
9 building.
10 Q But you saw him leave, right?
11 A (Nods negatively.)
12 Q Well, Chianti, do you remember
13 testifying at a prior proceeding?
14 A What's that?
15 Q At another trial about this case?
16 A Yes.
17 Q And do you remember testifying, then,
18 that the man left?
19 A Yes.
20 Q And also, when you testified before
21 about this case and you looked at Mr. Wiggins, you
22 couldn't say that he was that man, right?

23 A Yeah.
24 Q No further questions.
25 RE-DIRECT EXAMINATION

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1 BY MS. BROBST:
2 Q Why can you today, Chianti?
3 THE COURT: Can you answer, Chianti?
4 A Because that's him.

* * * *

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4 BY MS. COFFIN: [WITNESS: EDYTHE VASSAR]
5 Q Mrs. Vassar, did you know Florence Lacs?
6 A Yes, I did.
7 Q Do you know where she had lived?
8 A Yes. She lived in an apartment at, on
9 Woodlawn Drive.
10 Q Do you know what the number of her
11 apartment was?
12 A No. I really don't.
13 Q Did you know Mrs. Lacs to drive a car?
14 A Yes, she did.
15 Q I'm going to show you three photographs,
16 which I'll ask be marked as State's 1-E, D and A,
17 beginning with what is marked 1-E. Can you
18 recognize that?
19 A Yes. That is her car.
20 THE COURT: Ask you to speak a little bit
21 louder, please.
22 A That is her car.
23 Q And what has been marked as 1-D?
24 A That's also her car.

25 Q And what has been marked as 1-A?

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1 A Her car keys.
2 Q And how is it that you know that to be
3 her car?
4 A That's the license number.
5 Q You knew her tag?
6 A Um-hum.
7 Q I would ask that these be moved into
8 evidence.
9 MS. NETHERCOTT: No objection.
10 THE COURT: State's 1.
11 THE CLERK: A, D and E.
12 (State's Exhibit Nos. 1-A, 1-D and 1-E,
13 photographs, were entered in evidence.)
14 BY MS. COFFIN:
15 Q Do you know if Florence Lacs had a set
16 of keys for her car and a separate set of keys for
17 her apartment?
18 A It was all on one key ring.
19 Q Did you know her to ever leave her car
20 keys in the car?
21 A No, she had to have them to get in her
22 apartment.
23 Q Do you know if Mrs. Lacs had any credit
24 cards?
25 A Yes, she did.

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1 Q What credit cards do you know that she
2 had?

3 A The ones that I know are Penney's, Sears
4 and Hecht's.
5 Q Do you know where she kept those credit
6 cards?
7 A When I was with her, she got it out, one
8 out of her wallet when she used it.
9 Q I'm going to direct your attention to
10 Thursday, September 15th, 1988. Do you recall what
11 you were doing on that day?
12 A I don't remember the date, but what day
13 was it?
14 Q It was a Thursday.
15 A Thursday. We went to the club, Senior
16 Citizens Club.
17 Q On the 15th of September, do you recall
18 going to the Senior Citizens Club?
19 A If it was a Thursday, I went.
20 Q Do you remember being with Florence Lacs
21 on Thursday?
22 A I saw her but I didn't talk with her. I
23 spoke to her but she didn't hear me, didn't answer.
24 Q Did there come a time when you spoke
25 with her again?

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1 A I spoke with her on Friday morning,
2 between 10 and 10:15.
3 Q How did you speak with her?
4 A Over the telephone.
5 Q Did you call her?
6 A No, she called me.
7 Q And what was the nature of the
8 conversation?

9 A Well, she asked me what I was doing.
10 And I was getting ready to get a bath to go to a
11 luncheon down at Saint Luke's church. And she told
12 me she had to go back to the store. And I called
13 her stuck up because when I spoke to her when she
14 came back from getting a second cup of coffee, she
15 didn't answer, and she said she didn't hear me.
16 Q You say you were going to a luncheon on
17 Friday?
18 A That's right.
19 Q Where was this luncheon to be held?
20 A Saint Luke's church in Woodlawn.
21 Q Did you attend this luncheon every
22 Friday?
23 A Yes, we did at that time.
24 Q Who's we?
25 A Martha Leighty.

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1 Q Did Mrs. Leighty always attend the
2 luncheon with you?
3 A Yes, I picked her up and took her.
4 Q You always picked her up?
5 A Um-hum.
6 Q Did Mrs. Lacs ever attend this luncheon
7 with you?
8 A No.
9 Q Was she aware that you attended the
10 Saint Luke's luncheon every Friday?
11 A Yes, she was.
12 Q Had you asked her ever to attend with
13 you?
14 A No, I didn't.

15 Q What would you say was the length of
16 this conversation?
17 A It wasn't more than five minutes.
18 Q Was there anything unusual about the
19 conversation?
20 A No.
21 Q Thank you, Mrs. Vassar. That's all the
22 questions I have.
23 CROSS EXAMINATION
24 BY MS. NETHERCOTT:
25 Q Good morning, Mrs. Vassar.

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1 A Good morning.
2 Q Mrs. Vassar, you had known Ms. Lacs for
3 about 10 years, right?
4 A Right.
5 Q You talked to her on the telephone
6 before, right?
7 A Many times.
8 Q So you recognized her voice, right?
9 A Um-hum, right.
10 Q Okay. And you've been questioned about
11 this phone call many times, haven't you?
12 A Yes, I have.
13 Q In fact, you were questioned about it
14 one day after the phone call, correct?
15 A Yes. After they found her body.
16 Q And you also received a phone call at
17 some point from someone telling you you must be
18 wrong about it, right?
19 A Yes, I did.
20 Q But you're sure you're right?

21 A I'm sure I'm right,
22 MS. NETHERCOTT: No further questions.
23 THE COURT: Anything else?
24 RE-DIRECT EXAMINATION
25 BY MS. COFFIN:

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1 Q There was nothing unusual about this
2 phone conversation?
3 A No.

* * * *

16 BY MS. COFFIN: [WITNESS: ELIZABETH LAINE]
17 Q Mrs. Laine, did you know Florence Lacs?
18 A Yes, I did.
19 Q How do you know her?
20 A Well, she belonged to our Senior
21 Citizens Club.
22 Q Did you attend this Senior Citizens Club
23 on Thursdays?
24 A I did.
25 Q And Mrs. Lacs attended on Thursdays?

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1 A Yes.
2 Q Did you know where Mrs. Lacs lived?
3 A Yes. She lived in an apartment on
4 Woodlawn Drive.
5 Q On September 15th, 1988, did you see
6 Mrs. Lacs at the Senior Citizens luncheon?
7 A Yes, I did.
8 Q I'm going to direct your attention now
9 to the 16th of September. Did there come a time

10 when you noted anything unusual on the 16th?
11 A Well, that was Friday and I, I went to
12 the library at around 4 and automatically, I always
13 looked toward the parking lot and I, her car was not
14 there.
15 Q Whose car?
16 A Florence's.
17 Q What kind of car was that?
18 A She had a little red Chevrolet.
19 Q Did you note anything about the car
20 being gone at that time?
21 A Well, I just noticed that it was not
22 there.
23 Q How much time would you say you spent
24 with Mrs. Lacs on the 15th at the Senior Citizens
25 luncheon?

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1 A Well, we had our, we had our lunch. We
2 ate our lunch. And then we had a meeting after
3 that, and that was it.
4 Q So a couple of hours?
5 A I would say something like that.
6 Q Do you remember what Mrs. Lacs was
7 wearing on the 15th?
8 A Well, not the colors. But she usually
9 wore a blouse and skirt. I wouldn't, I don't know
10 the colors that day.
11 Q I'm going to direct your attention now
12 to the 17th of September, which was Saturday.
13 A A Saturday. Um-hum.
14 Q Had you planned any functions for that
15 Saturday?

16 A Well, there's six of us that used to
17 play pinochle and we took turns having each other at
18 our homes. And they would bring a sandwich and then
19 the hostess would furnish the dessert and coffee and
20 then we would play cards.
21 Q Who was to be the hostess on the 17th?
22 A I was.
23 Q And was Mrs. Lacs invited to attend
24 that?
25 A Oh, yes. She always.

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1 Q What time was it planned that everyone
2 would arrive at your home?
3 A Well, they usually arrived a little
4 before12 or around that time.
5 Q Did Mrs. Lacs arrive at twelve?
6 A No, she did not.
7 Q Did there come a time when she arrived?
8 A She didn't come.
9 Q Can you tell the ladies and gentlemen of
10 the jury what you did when Mrs. Lacs did not appear
11 at your home?
12 A Well, usually, she loved to play cards
13 and she was alone so she would come a little ahead
14 of time. Sometimes she would drive her own car and
15 sometimes one of the other ladies would bring her.
16 And she did not come and we, the rest of us ate our
17 sandwich and we waited, and she never came.
18 Before that, one of the other ladies that
19 drove went back and rapped on her apartment door and
20 there was no answer. And so then we ate our lunch
21 and we started to play cards, but she never came.

22 So I was kind of concerned because when
23 you live alone, you can fall. And I tried to get
24 her by phone several times and she didn't answer.
25 So when she didn't come, I just, I thought that's

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1 odd. So I said, I think I'll call the police.
2 Q And did you call the police?
3 A And I did call the police. And he came
4 and took the information.
5 Q Was this a uniformed officer who
6 arrived?
7 A Yes.
8 Q Do you remember discussing with him
9 Florence and her absence?
10 A I beg your pardon?
11 Q Did you tell the officer your concerns
12 about her not being there?
13 A I did.
14 Q Do you remember the officer ever asking
15 you about what you had last seen Florence Lacs
16 wearing?
17 A I just can't remember that. But he may
18 have. I don't remember.
19 Q Do you remember ever having seen
20 Florence Lacs in a red dress?
21 A No.
22 Q Thank you, Mrs. Laine. That's all the
23 questions I have. These folks might have a couple
24 questions for you.
25 CROSS EXAMINATION

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BY Ms. NETHERCOTT:
Q Ms. Laine, you testified that you were
the person who called the police on Saturday, right?
A Right.
Q And you spoke with a uniformed officer?
A Right.
Q Do you remember what he looked like?
A Well, he was young. He was youngish
and, I could, I couldn't tell you.
Q Young man?
A Yeah, youngish man.
Q And did you --
THE COURT: Excuse me. Ms. Laine, when
you answer, answer towards the jury.
A He was a youngish man.
Q He was a white man, right?
A Oh, yes.
Q And he took down the information, right?
A Right.
Q He wrote down what you told him?
A Right.
Q I'm going to show you something here
that's marked Defendant's Exhibit One. I'm going to
ask you if you can tell me if that's your signature?
A Yes.

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Q Okay. So you signed that?
A Yes.
Q Right?
A Yes.

Q And it says there that, last seen
wearing red dress, right?
A Oh, I didn't, I didn't, I didn't see
her.
THE COURT: Ma'am, you just can't carry a
conversation --
A I didn't see her when she wore the red
dress.

* * * *

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* * * *

BY MS. BROBST: [WITNESS: FLORENCE STAUFFER]
Q Mrs. Stauffer, were you related to
Florence Lacs?
A Yes.
Q And what was that relationship?
A I was her niece.
Q When did you last see Mrs. Lacs?
A About two weeks before.
Q Were you familiar with any of her
personal effects?
A Yes.
Q Now, I'm going to show you the contents
of an envelope which has been marked as State's
Exhibit Number 37, and I would ask you to look at
the contents of this envelope and tell me whether
you can identify it.
A That's her ring,
Q And by her, to whom are you referring?

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A Florence Lacs.
Q Now, does this ring appear to you to be

in substantially the same condition as it was when you last saw it?
A Yes.
Q And if you know, where did Mrs. Lacs customarily keep this ring?
A In her jewelry box in her bedroom.
Q I would move to introduce State's Exhibit Number 37 into evidence at this time.
THE COURT: Any objection?
MS. NETHERCOTT: No objection.
(State's Exhibit No. 37, ring, was entered in evidence.)

* * * *

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BY MS. BROBST: [WITNESS: GERALDINE ARMSTRONG]
Q Miss Armstrong, could you please give us your address?
A 4103 Paran Road, Randallstown.
Q And with whom do you live at that address?
A I beg your pardon?
Q With whom do you live at that address?
A My sister and my mother.
Q Do you know the defendant, Kevin Wiggins?
A Yes, I do.
Q And back in 1988, September of 1988, did you know him at that time?
A Yes, I did.
Q Can you describe your relationship with him in September of 1988?
A It was a normal relationship between a man and woman.

Q Would you characterize it as boyfriend/girlfriend?
A Yes. Uh-huh.
Q And have you proceeded to keep in touch with the defendant since September of 1988?
A Yes. I have.

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Q Do you have any children together?
A Yes, we do.
Q And how old is that child?
A She's 19 months.
Q Now, on September 15th, 1988, specifically, were you living at the Paren Road address?
A Yes.
Q Where was the defendant living?
A At the time, he was living in his car.
Q And prior to that, to your knowledge, had he lived at the Clark Manor Apartments?
A I beg your pardon? I didn't hear you.
Q Before he was living in his car, if you know, did he live at the Clark Manor Apartments?
A Yes, uh-huh.
Q And how do you know that?
A My brother. He was living with my brother.
Q Okay. And at what time, during what dates was he living with your brother in the Clark Manor Apartments?
A It was so much going on then, I really don't know the dates. It was during the summer, because at that time my sister had passed. So

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really the dates, I really couldn't tell you, or
what month. It had to be between June and July,
around there.
Q Of 1988?
A Yes.
Q Okay. Thank you, now, I want to direct
your attention specifically to Thursday evening,
September 15th, 1988. Were you working at that
time?
A Yes.
Q And where were you working?
A At Social Security.
Q Are you still employed there?
A Yes, I am.
Q And did you work on that Thursday?
A Yes, I did.
Q Do you recall what time you got home
from work?
A It was between, between seven, 7:15.
Q And what did you do when you returned
home to Paran Road?
A I was beginning to cook. Beginning to
make dinner.
Q And what happened that night?
A Well, shortly after that, Kevin came in

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and --
Q And by Kevin, to whom are you referring?
A Kevin Wiggins.
Q Is he in court today?

A Yes, he is.
Q Could you indicate where for us, please?
A Sitting right there (indicating).
Q Indicating, for the record, the
defendant seated with counsel at trial table.
Do you recall what time he came over?
A It was between 7:30 and quarter to
eight, I believe it was.
Q And what happened?
A He had asked me if I wanted to go
shopping and I told him yes. And at that time I
asked my brother could he finish cooking for me and
he said he would.
Q Okay. And how did the defendant get to
your house?
A He drove, as far as -- yeah, as far as I
know, he drove. He had a car.
Q Okay. What kind of car did he have that
night?
A It was a Chevette.
Q Can you describe it?

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A It was a reddish-orange Chevette.
Q Had you ever soon that car before,
before this evening?
A No, I haven't.
Q You had not?
A No, I had not.
Q And did you ask him about that?
A Yes, I did.
Q What did he say?
A He said it was a friend of his.

11 Q Did you accept that?
12 A Yes. At the time, uh-huh.
13 Q And what happened when he was at your
14 house, the defendant?
15 A Well, as usual, he likes to, to clean
16 up. And he asked me could he just wash his face and
17 I said yes. But my sister did not want him using
18 the facilities there. We had an argument about it.
19 Q Now, did there come a time when you left
20 the Paran Road address? Did you leave that night?
21 A Yes, I did.
22 Q And how did you leave? What was your
23 mode of transportation?
24 A The little orange car.
25 Q The little orange car?

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1 A Um-hum.
2 Q And who left?
3 A Me and Kevin.
4 Q Where were you going?
5 A We had gone to Security Mall.
6 Q What time was that?
7 A At that time, that was about, between 8
8 and 8:15.
9 Q And why did you go to Security Mall?
10 A Well, they had different clothing stores
11 there, so that would be the first place I would go,
12 that I've always shopped at, anyway.
13 Q So you went to go shopping?
14 A Yeah.
15 Q And tell us what happened.
16 A Well, we had gone shopping and we went

17 to the Hecht Company and we got a couple things
18 there.
19 Q Well, tell us about that. How did you
20 pay for these things?
21 A A credit card.
22 Q And whose credit card was it?
23 A The name on it? It was a Ms. Lays
24 (sic), Florence Lays.
25 Q And who had this credit card?

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1 A Kevin had it.
2 Q Kevin had it?
3 A Um-hum.
4 Q And did you ask him where he got it?
5 A Yes, I did.
6 Q What did he say?
7 A He said it was his, one of his aunt's,
8 had loaned him some cards that he could go shopping.
9 Q And what did you buy at Hecht Company
10 that night; do you recall?
11 A It was a watch, I believe, for my son,
12 and I think I got something for myself that night.
13 Q Jewelry?
14 A No. I got a suit for myself. I think
15 Kevin got maybe jewelry for himself. A necklace, I
16 think.
17 Q Now, how did you pay with Florence Lacs'
18 credit card?
19 A I beg your pardon?
20 Q How did you pay with her credit card?
21 A Charged it.
22 Q But who signed the credit receipts?

23 A I did.
24 Q And what name did you use when you
25 signed the receipts?

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1 A The same name that was on the credit
2 card.
3 Q Did this not concern you?
4 A Well, he had said that it was one of his
5 aunts and she didn't mind, and my sister let me use
6 hers so I didn't think nothing of it.
7 Q So you accepted his explanation?
8 A Yes, I did.
9 Q And did you sign all the receipts that
10 evening?
11 A Yes, I did.
12 Q Why?
13 A He had asked me to.
14 Q Now, do you recall what time you left
15 Security Square Mall that night?
16 A Well, the stores had closed. So it had
17 to be 9:30.
18 Q And where did you go?
19 A Well, we stopped to eat and I went
20 home.
21 Q And how did you travel from Security
22 Mall to your home?
23 A In the same car.
24 Q Do you recall what time you arrived
25 home

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1 A It might have been between 10, 10:30. I
2 I don't think it was too much later. It was, it
3 couldn't have been no later than 11:00.
4 Q Now, on September 15th, 1988, was the
5 defendant working? Was he employed?
6 A Was he employed, what time did you say?
7 What date?
8 Q On that date, on that Thursday,
9 September 15th?
10 A As far as I know.
11 Q Well, did you know him to be working?
12 A Yes.
13 Q And where was he working?
14 A At the apartments. At the -- I don't
15 really recall the name of it.
16 Q Okay. And do you know what kind of work
17 he was doing there?
18 A He was painting.
19 Q Now, after you got home on the evening
20 of September 15th, 1988, what did you do?
21 A On the evening of September 15th?
22 Q Yeah. After you got home from Security,
23 from Hecht's at Security?
24 A This is on a Thursday?
25 Q Yes, ma'am.

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1 A We sat and we looked at TV for a little
2 while and he left and I went to bed.
3 Q And did you make arrangements or plans
4 for the next day, Friday?

5 A Well, he was to pick me up to go to
6 work.
7 Q And did he do so?
8 A Yes, he did.
9 Q At what time?
10 A It was around 7:30, I think. 7:30 to
11 something of 8, because I was running late.
12 Q And do you mean a.m. or p.m.?
13 A A.m.
14 Q And what was he driving when he picked
15 you up?
16 A The same car.
17 Q Now, did you have a conversation on your
18 way to work?
19 A Yes, we did.
20 Q And what was that conversation?
21 A At that time, I was telling him I might
22 take off a little early because I didn't, I wasn't
23 feeling good, I had a cold. And he mentioned if I
24 needed him, to give him a call. And then he
25 stopped, he dropped me off to work, and I went

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1 inside and I told my boss I was. going to take off
2 early because I didn't feel good.
3 Then I called him maybe about a half an
4 hour or an hour later, after I started work. And
5 then I got a phone call stating that his clothes
6 were supposed to have been put out, and I was trying
7 to get in contact with him for that. And I couldn't
8 get in contact with him because I tried about two or
9 three times to call.
10 I was getting ready to leave and on my, I

11 didn't still didn't speak to him but my boss had
12 told me if I would wait, Kevin said he would come
13 and pick me up.
14 Q And did he pick you up?
15 A Yes, he did.
16 Q Is this at Social Security?
17 A Yes.
18 Q And what was he driving when he picked
19 you up?
20 A The same car.
21 Q And what time was it?
22 A It was about 12:30, something to one.
23 Q On Friday?
24 A Yes.
25 Q And what did you do? Where did you go?

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1 A Well, I went home. I was expecting my
2 check. And I wanted to see how my mother was
3 doing. And my check didn't arrive at that time. So
4 I left. We left and we went shopping. He asked me
5 did I want to finish picking up something for the
6 baby and I said yeah.
7 Q So what shopping facility did you go to?
8 A Well, we went to Security Mall. We had,
9 he had picked up some things for himself and then we
10 had gone to Columbia.
11 Q Okay. Now, while you were at Security,
12 which stores did you shop in?
13 A It was Hecht Company and J.C. Penney's.
14 Q And in the Penney's store, did the
15 defendant purchase any jewelry?
16 A Yes. Uh-huh.

17 Q And do you recall specifically what
18 jewelry he purchased?
19 A It was some rings, some more things for
20 myself, and some things for the baby.
23 Q Now, at Hecht's and Penney's, who signed
22 either of the credit card receipts?
23 A I did. Excuse me.
24 Q And what name did you use?
25 A The name that was on the credit card.

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1 Q Do you recall how much property you had
2 charged by the time you left the Security Mall in a
3 dollar value?
4 A No, not really.
5 Q You don't recall?
6 A No.
7 Q Do you recall getting a ring for
8 yourself?
9 A Yes.
10 Q And did the saleslady ask you to fill
11 out anything at that time after the purchase of a
12 diamond ring? Do you recall that?
13 A Yes, I do. Now I do.
14 Q Tell us about that. What happened?
15 A I didn't fill it out.
16 Q Okay. Who did?
17 A Kevin filled it out for me.
18 Q And do you recall what information it
19 called for?
20 A No. Because I didn't even really look
21 at it.
22 Q Do you recall the name of the saleslady?

23 A No, I don't.
24 Q Do you remember?
25 A I didn't ask her name.

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1 Q Other than the purchases that you all
2 were making on Mrs. Lacs' credit card, do you recall
3 her giving anything to the defendant?
4 A Giving, giving the defendant anything?
5 Q Um-hum.
6 A No.
7 Q Okay. Now, after you left Security, you
8 went where?
9 A We went to Columbia.
10 Q In the same car?
11 A Um-hum. Yes.
12 Q And why did you go to Columbia?
13 A They have a nice restaurant out there
14 that I wanted to go. That's one of the reasons why
15 I went out there.
16 Q Any other reason?
17 A No. Only to, while we was out there,
18 then I stopped at Sears while we was out there. But
19 no, no other reason.
20 Q Okay. What did you do at Sears?
21 A Got some things for the baby.
22 Q And what did you use to get some things
23 for the baby?
24 A The same credit card.
25 Q And who signed those receipts?

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A I did.
Q And what name did you use?
A Lays, Florence Lays.
Q And did you question the defendant any
further about those credit cards?
A Yes. But he said as long as he made the
payments on them, that they would be all right.
Q Did that raise any suspicions on your
part?
A No. Like I said before, I have used my
sister's and I have used more than one, and I've had
possession of her credit cards that I could use to
my advantage as long as I paid for them.
Q Had you met an aunt of the defendant?
A No. I haven't met all his family,
anyway.
Q Now, did there come a time on Friday,
the 16th of September, 1988, when you left Columbia,
the Columbia Mall?
A Um-hum.
Q Sears store? Did that happen? Did you
leave?
A Yeah.
Q And where did you go?
A We went home.

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Q Anything unusual happen that evening?
A No.
Q Now, I'd like to direct your attention
to Saturday, September 17th, 1988. Do you recall

going Downtown into Baltimore on that date?
A Yes.
Q Why don't you tell us about that,
please?
A He had a ring.
Q Who is he?
A Kevin Wiggins had a ring that he said
that he had gotten or found and had wanted me to
pawn for him.
Q And he said he got or found a ring that
he wanted you to pawn?
A Yeah.
Q Can you describe that ring?
A It was an old diamond ring.
Q Did you ask him about how he acquired
it?
A He said he found it. No, I didn't.
Q And what did you do?
A I went to, well, I didn't know what pawn
shop it was, but I went to the pawn shop and I
pawned it.

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Q And whose name did you use when you
pawned the ring?
A Mine.
Q Were you asked to show any
identification?
A Yes.
Q Did you do so?
A Yes.
Q And do you recall where Downtown this
pawn shop was?

A It was down near the Civic Center. I'm
not that familiar with Downtown because I don't go
Downtown. I know it's right near the Civic Center.
Q And after you pawned the ring, do you
recall how much you got for the ring?
A It was between 30, 35.
Q Dollars?
A Uh-huh.
Q And then what did you do after you
pawned the ring?
A We went to his aunt's house.
Q Now, I'd like to direct your attention
forward in time, to September 21st, 1988. That was
a Wednesday, at about 10:00 at night. Were you with
the defendant at that time?

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A Yes.
Q And can you describe what happened at
that date and time, where you were and what
happened?
A Yeah. Well, we were driving in a car.
I just had gone to the store to get the baby some
milk and we were driving and on Windsor Mill Road on
our way back home, and it was going right past the
police station. And it was just so such commotion,
so many police, and I was scared to death.
Q Okay. Were you stopped by the police?
A Yes. Um-hum.
Q And was the defendant with you?
A Yes, he was.
Q Was that the same car, the car that you
were in that night, was that the same car that he

had picked you up in on Thursday, September 15th?
A Yes, um-hum.
Q Now, you stated earlier in your
testimony that the defendant, on September 15th,
1988 had been living in a car. What car was that?
A He has a car and something had happened
to it. It needed -- it was in the shop.
Q It was in the shop that day?
A Um-hum.

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MS. BROBST: I have no further questions,
Miss Armstrong. Thank you very much. The defense
will have some questions.
MR. SCHLAICH: Court's indulgence for a
moment.
(Pause.)
CROSS EXAMINATION
BY MR. SCHLAICH:
Q Miss Armstrong you remember testifying
here previously, correct?
A Yes.
Q And specifically, with respect to when
Kevin lived at the apartment with your brother, do
you remember testifying previously that he lived
there in the fall of 1987?
A It might have been.
Q Okay. Today you testified the summer of
1988?
A Well, see, that's when I met him. See,
I don't know how long he's been there. But that's
when I first saw him there. Now, he might have
been.

23 Q I see. So the last time he lived there
24 was?
25 A I don't recall me saying the fall but if

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1 I did, it could have been.
2 Q Okay. So the last time that he lived
3 there was the summer of 1988, is that what you're
4 saying?
5 A Yes, uh-huh.
6 Q And then he didn't move from there out
7 into his car, right?
8 A No.
9 Q He had a place to live?
10 A Oh, yeah.
11 Q And he had a car that he was keeping the
12 payments on?
13 A Right.
14 Q And when you met Kevin in the summer of
15 1988, he had a job?
16 A Yes.
17 Q What was he doing then?
18 A He was working at Mr. Good Buys.
19 Q And in the time that you knew him, did
20 he have any other job?
21 A Yes. He was working several places.
22 Q Do you recall any of them?
23 A It was a restaurant, a couple of them
24 were. They sell crabs and -- I can't think of the
25 name at the moment. I think about Red Lobster, but

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1 I know it wasn't Red Lobster.
2 Q In fact, at least at one point in time,
3 he worked two jobs at one time, correct?
4 A Yeah. Um-hum.
5 Q And to your knowledge, did Kevin ever
6 finish high school?
7 A To my knowledge.
8 Q To your knowledge, did he or didn't?
9 A He did.
10 Q No other questions, Your Honor.
11 MS. BROBST: No re-direct, Your Honor.
12 THE COURT: Thank you, ma'am. You can
13 step down.
14 MS. COFFIN: Your Honor, at this point, if
15 we might do one of the stipulations. I've made
16 copies of the stipulations for the jury to read
17 along with me.
18 MR. SCHLAICH: That's fine.
19 THE COURT: Is that okay? Okay.
20 MS. COFFIN: In addition, I would ask that
21 this stipulation which has been previously marked
22 for identification as State's Exhibit Number 3 for
23 sentencing, and the accompanying exhibits which have
24 also previously been marked for identification,
25 their number being 4 through 26, be moved into

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1 evidence.
2 (State's Exhibit Nos. 3, and 4 through 26,
3 stipulation and exhibits, were entered in evidence.)
4 MS. COFFIN: Ladies and gentlemen, it has

been hereby stipulated and agreed between and by the State of Maryland and Kevin Wiggins, the defendant on trial, in Criminal Case 88-CR-5464, that the following are true and accurate facts.

THE COURT: Excuse me. We need one more copy. Just one more? Two more.

MS. BROBST: I have an additional copy, Your Honor.

THE COURT: You can use mine. You need two more up there.

MS. COFFIN: That the following are the true and accurate facts: 1. That the defendant was in possession of Florence Lacs' Hecht's credit card, Account Number 515436664 on September 15th and 16th, 1988, without Florence Lacs' permission.

2. That on September 15th, 1988, it was a Thursday, the defendant, along with Geraldine Armstrong, purchased the following items from the Hecht's Company Department Store located at Security Square Mall. Payment for these items was made using Florence Lacs' Hecht's credit card without her

permission: At 8:57 p.m., from the Fine Jewelry Department -- one herringbone chain, valued $328.13; Exhibit Number 4 will be the sales receipt which you will receive at a later time.

At 9:14 p.m., from the Ladies Sportswear Department -- three articles of clothing with a value of $153.28; Exhibit Five being the receipt of that transaction.

At 9:19 p.m., from the Fashion Watches Department -- one Swatch watch valued at $36.75;

Exhibit Six being the seat in that case.

3. That on September 16th, 1988, Friday, the defendant, along with Geraldine Armstrong, purchased the following items from the Hecht's Company Department Store located at Security Square Mall. Payment for these items was made by using Florence Lacs' Hecht's credit card without her permission: A, at 3:51 p.m. from the Men's Department -- two articles of clothing, value $74.93; Exhibit Seven is the sales receipt for that transaction.

4. There was a purchase of Naturalizer shoes valued at $40.95 on August 21st, 1988 at the Hecht's Company Department Store. This purchase was made by Florence Lacs. Payment on the Hecht's

charge account was made on September 29th, 1988. This payment was made on behalf of Florence Lacs by her nephew-in-law, Charles Stauffer, Exhibits Eight and Nine will reflect that.

5. That there has been no other activity on Florence Lacs' Hecht's credit card between the date of August 21st, 1988 and September 15th, 1988.

6. That the defendant was in possession of Florence Lacs' J.C. Penney's credit card, Account Number 0146339734 on September 15th and 16th, 1988 without Florence Lacs' permission.

7. That on September 16th, 1988, Friday the defendant, along with Geraldine Armstrong, purchased the following items along from J.C. Penney's located at Security Square Mall. Payment for these items was made by using Florence Lacs'

17 J.C. Penney's credit card without her permission:
18 A, from the Fine Jewelry Department -- one
19 ring, 14 karat gold with a dark blue sapphire stone,
20 surrounded on one side with diamond chips, that had
21 a valued of $468.59. Exhibit 10 will be the sales
22 receipt.
23 I, this ring was recovered from the
24 defendant's person when he was arrested on September
25 21st 1988, so that number 11 is that ring.

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1 B, from the Fine Jewelry Department -- one
2 ring,14 karat gold, with a gray-white cat's eye
3 stone, valued $367.50. Exhibit 12 is the sales
4 receipt for that transaction.
5 I, this ring was also recovered from the
6 defendant's person when he was arrested on September
7 21st, 1988, Exhibit Number 13 is, in fact, that
8 ring.
9 C, from the Fine Jewelry Department, one
10 ring, lady's diamond chip cluster ring, valued at
11 $114.19. Exhibit 14 is the sales receipt of that
12 transaction.
13 D, from the Women's Department, three
14 articles of clothing valued at $130.20. Exhibit 15
15 is the sales receipt of that transaction.
16 E, from the Infant Department, infant
17 furniture and clothing valued at $64.83; Exhibit 16
18 is the sales receipt for that transaction.
19 Eight, that on September 16th, 1988,
20 Jeanetta Washington was the salesperson at the J.C.
21 Penney's Fine Jewelry Department. Ms. Washington
22 requested that the defendant complete a client

23 card. The defendant provided false information with
24 the name and address of Kevin Jackson of 4552 Finney
25 Avenue. The defendant also provided a false address

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1 of 1951 Walnut Avenue for the diamond certificate.
2 Exhibits 17 and 18 are the client card and the
3 diamond certificate.
4 Jeanetta Washington of J.C. Penney's --
5 excuse me. Jeanetta Washington's J.C. Penney's
6 business card was found in the defendant's wallet
7 when he was arrested on September 21st, 1988; that
8 business card is Exhibit Number 19.
9 10. That there was no other activity on
10 Florence Lacs' J.C. Penney credit card between
11 August, 1988 and September 16th, 1988.
12 11. That the defendant was in possession
13 of Florence Lacs' Sears credit card, Account Number
14 5485648590394, on September 16th, 1988 without
15 Florence Lacs' permission.
16 12. That on the 16th of September, 1988,
17 Friday, the defendant, along with Geraldine
18 Armstrong, purchased the following items from the
19 Sears Department Store located at the Columbia
20 Mall. Payment for these items was made by using
21 Florence Lacs' Sears credit card without her
22 permission.
23 A, casual shoes valued at $49.34; Exhibit
24 20 is the sales receipt for that transaction; B,
25 jeans with a value of $20.99, Exhibit 21 being the

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1 sales receipt of that transaction; C, three articles
2 of clothing valued at $53.52; Exhibit Number 22
3 being the sales receipt of that transaction; D, one
4 14 karat gold chain, seven inches, valued at $31.49;
5 Exhibit 23 being the sales receipt of that
6 transaction; E, 14 karat gold chain valued at
7 $83.99; Exhibit 24 being the sales receipt of that
8 transaction; F, two travel bags valued at $46.18;
9 Exhibit 25, the receipt of that transaction; G,
10 infant two piece set valued at $11.54; Exhibit 26
11 being the sales receipt of that transaction.
12 13. That there was no other activity on
13 Florence Lacs' Sears credit card between August,
14 1988 and September 16th, 1988.
15 14, that there was no activity on Florence
16 Lacs' Hecht's, J.C. Penney's or Sears card after
17 September 16th, 1988.
18 15. That Joan Murley, Document Examiner
19 for Baltimore County Police Department, examined all
20 of the signatures on all 16 sales receipts from
21 Hecht's, Penney's and Sears and stated, in her
22 expert conclusion, that Geraldine Armstrong prepared
23 the Florence G. Lacs signatures on all of those
24 sales receipts.
25 16. That Detective Tim Ostendarp,

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1 Fingerprint Examiner for Baltimore County Police
2 Department, conducted comparison examination of a
3 latent fingerprint found on the front of a Sears
4 sales receipt, that sales receipt had a total value

5 of $53.52, and found the characteristics to be
6 identical to the inked fingerprints of Geraldine
7 Armstrong.

* * * *

[WITNESS: DETECTIVE SERGEANT LEONARD BUTT]
25 BY MS. COFFIN:

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1 Q Sergeant Butt, how long have you been
2 with the Baltimore County Police Department?
3 A I've been with the department going on
4 15 years now.
5 Q You just stated to the ladies and
6 gentlemen of the jury that you're in the Baltimore
7 County Crime Lab?
8 A Yes, ma'am.
9 Q How long have you been in that?
10 A I've been in the Crime Lab for seven
11 years, in the Latent Print Unit for the past five
12 years.
13 Q Can you tell the ladies and gentlemen of
14 the jury what a Latent Print Unit is?
15 A The Latent Print Unit has the
16 responsibility of examining prints which are
17 recovered from crime scenes. When I'm referring to
18 latent print, I'm referring to a print that was left
19 on an object, then through some form of processing,
20 was recovered by somebody that has that
21 responsibility. And then the prints are returned to
22 our office where we actually conduct the
23 examinations to see if we can identify a particular
24 print from a particular individual.
25 Q Did you receive any special training to

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prepare you for conducting comparisons of fingerprints?
A I received some basic training when I entered the police department through our training academy. Received training through Essex Community College in various courses I've taken there in criminalistics. From the Federal Bureau of Investigation. Also from two certified latent print examiners who had been working for our department when I first entered into the latent print field. I've taken a number of courses, seminars. I travelled across the country to attend what seminars I can gain access into. Done a number of things on my own as far as reading professional manuals or textbooks whenever I can get my hands on them to stay in tune with the field. Yes.
Q Have you had occasion in the past to compare latent fingerprint samples to known inked fingerprint samples?
A Yes, ma'am, I have.
Q Approximately how many times have you done that comparison?
A Several thousand.
Q Have you had occasion to testify before

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in court, either in Baltimore County or any other county, as an expert in latent print fingerprint examination?
A Yes, ma'am, I have. This will be the

31st time I've testified in court on such matters.
Q Your Honor, at this time I would offer Sergeant Butt as an expert in latent fingerprint examination.
MR. SCHLAICH: No objection.
THE COURT: Accepted.
BY MS. COFFIN:
Q Sergeant, did you have occasion to respond to the location of 1951, Apartment C, Woodlawn Drive?
A Yes, ma'am, I did.
Q And in what capacity did you respond to that location?
A I was there as the supervisor of the mobile lab tech who was responsible for processing the scene.
Q And what were your responsibilities at that scene?
A To act as a coordinator, essentially, between the investigator from the Homicide Unit and also the investigator from our unit, the mobile lab

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tech, and also to advise on the processing of the scene to that technician as necessary.
Q What was the date you responded to that location and the time?
A I don't have the time, actually, that I responded. It was on the 17th of September of 1988.
Q Were there others there, also, responsible for processing the crime scene?
A Responsible for processing the crime

11 scene were two mobile lab techs from the Crime Lab,
12 Detective Roy Frederick and Detective Larry Ches.
13 Q And to your knowledge, they conducted
14 all of the processing of that crime scene?
15 A They conducted nearly all. There were a
16 couple things I took upon myself, but very minor.
17 Q Did you, yourself, take upon the lifting
18 of any prints that may have been found at that
19 location?
20 A I did not lift any prints, no, ma'am.
21 Q Do you know if fingerprints were, in
22 fact, lifted at that location?
23 A Yes, ma'am, there were prints lifted
24 that day.
25 Q Do you know how many prints were lifted

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1 and the location that those prints were lifted?
2 A Yes, ma'am. They were seven lift cards
3 that were prepared that day, recovered from the
4 crime scene, various locations. I'll have to read
5 off the cards themselves.
6 The bottom of the soap box that was found
7 on the dining room table. There were a couple
8 prints recovered from the interior side of the front
9 apartment door.
10 There were two prints that were recovered
11 from the exterior door frame going into the bathroom
12 area of the apartment. And there were also two
13 prints which were recovered from the kitchen
14 archway, the interior side of the kitchen.
15 Q Of those seven total prints that were
16 recovered, how many was the Crime Lab able to

17 identify?
18 A Identifications were made on two of the
19 prints.
20 Q And what were the locations of those two
21 prints that were identified?
22 A Those prints that were recovered from
23 both sides of the doorway going into the bathroom
24 from the hallway.
25 Q And whose prints did they belong to?

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1 A They were identified as belonging to
2 Officer B. Williams, and that identification was
3 made by Detective Sergeant Jimmy Simms.
4 Q That then leaving five unknown or
5 unidentified prints left at the scene?
6 A Yes, ma'am.
7 Q Could you explain to the ladies and
8 gentlemen of the jury the process that you use or
9 perform to complete a print identification or
10 analysis?
11 A When I'm referring to fingerprints, on
12 the base of your hand, the fingers, and the palms,
13 and also on the soles of your feet, for that matter,
14 there are a number of ridges. I'll refer to those
15 as friction ridges. These ridges, if you actually
16 just look at your hand, you can see them with no
17 problem. If you were to place your finger on to a
18 piece of glass when in was in a sweaty condition or
19 whatever, hold that glass up in front of a light,
20 you would actually be able to see these ridges,
21 these lines. The ridges themselves, if you really
22 pay attention to them, don't just enter into the

print area and circle around and go back out the
opposite side or come in one side and just go back
in the opposite side. What they'll tend to do is

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enter into the print area, and then at time, they'll
just stop. At that point where they stop, I refer
to that as characteristic, and that will be a ridge
ending.
The ridge may also just come into the
print area and then separate into two individual
ridges. At that point where it actually separates,
that's a characteristic that we also look for, and
it's called a bifurcation.
There are also times whether there may be
a point that lays between two rings. It has no
direction but is consistent in width as the width of
the ridges that it lays between. That particular
point is a third characteristic that we'll look for
in doing the comparisons, and we'll refer to that as
a dot.
What we're looking for, first of all, is
to see if we can find a cluster of these
characteristics that are found, first of all, in the
latent fingerprint, clearly identifiable, and then
also in an inked fingerprint which we may have
before us if we're asked to conduct an investigation
of one to the other.
If we can find a group of characteristics
that match not only to the type of characteristics

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but in the type they come into the print and the
relative position to each other, we then continue
from that small cluster of characteristics and look
through the print that were in relative position to
each other and also share the same position or
direction.
After we examine the print, we'll come to
a conclusion of, one, either they are the same
because all the characteristics that we found go in
the same direction or are in the same relative
position to each other, or two, that there may be no
identification made because of the clarity of the
print, meaning that the latent print that we're
looking at or the inked print that we have before us
is unclear in the particular area that we have to
look at for these characteristics, and we're unable
to decide if it is or is not actually an
identification; or three, that it is not, the latent
print is not identifiable with the inked
fingerprint, meaning that they were not made by the
same person.
And we'll draw a conclusion of one of
those three items and file a report on same.
Q Are you familiar with the term, print
elimination?

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A Yes, ma'am.
Q Can you explain to the ladies and
gentlemen of the jury what that means?
A Well, when we're looking at an inked

fingerprint, we may be looking at a criminal fingerprint for examination or we may be looking at a fingerprint that was provided to us, an inked fingerprint which would be a print taken from an actual person, we know where it originated from. That print may come from the victim of an incident. It may come from somebody who had legitimate access to the incident, such as Officer Williams in this particular case. His prints were identified in the case. He was examined for elimination purposes. We routinely examine police officers who routinely enter the crime scene without protection, to see if maybe their fingerprints are there. We have prints recovered but we've eliminated those prints as having been placed at the crime scene legitimately.
Q For the ladies and gentlemen of the jury, can you tell whose prints were eliminated in this case by the Crime Lab as compared to those five unidentified prints that were recovered from 1951-C?

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A For elimination purposes, we examined Mr. Joseph Thiele, Miss Florence Lacs, who was the victim. I would indicate that the prints recovered from her were very poor in quality. Mr. Robert Vaccaro, Mr. Paul Kiebel, Mr. Danny Platt, P. Henson and Lieutenant J. Carson. However, we had no palm prints available on Lieutenant Carson when we conducted our elimination exam.
Q And the Crime Lab also conducted elimination in reference to Officer Williams, is

that right?
A Officer Williams, yes, who was identified.
Q Any other police officers that were initially at the scene?
A Not that I have reported, no, ma'am.
Q You just indicated that Florence Lacs' prints were poor in quality?
A Yes, ma'am.
Q Do you know when those prints were obtained from Florence Lacs?
A Sometime after the incident occurred.
Q The five unidentified prints that you did recover from 1951-C, Apartment C, Woodlawn Drive, do you have a raring system or a value system

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that you place upon prints that you recover? That is, are some prints recovered better for identification purposes or not as good?
A Certainly. Often times, prints that are recovered from crime scenes are of no comparison value, meaning that the characteristics that we require to actually make the identification, there may not be a substantial number of those characteristics clearly visible in the print that we can use to conduct an examination.
A And of those five prints found in 1951, Apartment C, Woodlawn Drive, what would be your rating of those five prints?
A There was, in this particular case, five of the print cards that were of good quality for examination. There was one print that was of

marginal quality, meaning that the characteristics were there but they're not clearly defined and it's going to take a good bit of examination to actually make an identification off of that. And the possibility is that even if we have the correct ink card to match to that latent, we may still not be able to make the identification because of the quality of the latent.
One of the latents was of such poor

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quality that identification is not probable. It's of no identifiable value.
Q So of those prints, how many did you feel you had a good enough quality to make some sort of a valid comparison?
A Six, actually.
Q And how many were actually identified?
A Two.
Q So that left three unidentified prints That were of good quality for comparison purposes?
A That were of very good quality and one that was of marginal quality, yes.
Q were you ever able to identify Florence Lacs' fingerprints in the apartment?
A No, ma'am.
Q Is that unusual?
A Not necessarily. No.
Q Did you have occasion, while processing the scene on the 17th of September; to make any unusual observations as to markings at the crime scene?
MS. NETHERCOTT: Objection.

THE COURT: Overruled.
A At the crime scene, there was a particular area that the technicians that were

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responsible for processing the crime scene had started to process and they noted that there were some markings on a particular drawer that was located in the living room area of the apartment. On the face of that drawer, there were some markings which were consistent with water marks. Any time you wash your car, let's say, and you don't dry it properly, it sits out in the sun, you'll be able to actually observe water marks on the windshield area or on the body of the car. This particular surface revealed that type of marking. Just refer to it as water marks on the surface.
They stopped processing that particular area when they found those markings. That's the particular area that I went back and finished processing with later, yes.
Q And where exactly were those markings?
A They were on the front of a drawer that had been removed from whatever object, whatever table or console, whatever, and placed on the, actually on the sofa in the living room of the apartment.
Q Did you attempt to lift these markings for any comparison purpose?
A No, ma'am. They had no comparison

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value.
Q And why is that?
A Because they were simply water marks.
They showed no characteristics that would indicate
either fingerprint ridge detail or fabric
impressions. Would also be possible to collect
fabric impressions, if they were there. Or often
what we'll find in crime scenes will be a person
will use a Playtex type glove. Playtex gloves will
also have ridges formed, actually molded right into
the face of the glove, same as your fingerprints
would be. They're there for friction so that
somebody can actually grab something.
It's common to find somebody to use that
type of glove to leave actually the impression of
that type of detail on an object, ridge detail on an
object.
Q By ridge detail, you're referring to the
swirls?
A The actual ridges you would find, the
swirls, the lanes on the fingers, on the palms of
your hands.
Q Would there be any indication on those
marks if the hand was moving or would you be able to
determine that from those markings?

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A It may be possible to see that there was
a wiping motion and the water beaded actually at the
end of that wipe.
Q And of those prints that you observed in

1951, were you able to draw any of those conclusions
in reference to those marks?
A I honestly don't recall.
MS. COFFIN: Thank you very much.
THE COURT: Cross examine.
MR. SCHLAICH: One second.
CROSS EXAMINATION
BY MS. NETHERCOTT:
Q Sergeant Butt, you had occasion to
compare the prints that were recovered against Mr.
Wiggins' prints, correct?
A Yes, ma'am.
Q And that was done on the 21st of
September?
A I'm not quite certain of the date. I
don't have my reports. I know you have them there.
Q Okay. If I show you this?
A Sure.
Q Would it refresh your recollection?
A Certainly.
Q I need this marked as Defendant's Two.

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Thank you.
Sergeant Butt, I'll show you what's been
identified as Defendant's Exhibit Two. It's titled,
Baltimore County Police Department Request for
Latent Print Comparison?
A Yes, ma'am.
Q Is that your signature on the bottom?
A Yes, it is.
Q Okay. Can you just indicate for the
jury what the form says?

A What it indicates is that I was
requested by Detective McDonald, Lanny McDonald from
the Homicide Unit to examine Mr. Kevin Wiggins
prints, his inked fingerprints that we know came
from Mr. Wiggins, against the latent fingerprints
recovered in this particular incident. And the
results of my examination was that there was no
identification made. It was a negative exam, and it
was conducted September 21st, 1988.
Q Thank you very much, Sergeant.
(Pause.)
THE COURT: Miss Nethercott?
Q Yes, Your Honor. Sergeant Butt, you
indicated that you also had occasion with regard to
this crime scene to compare these prints that you

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recovered against the prints of other individuals,
correct?
A Yes, ma'am.
Q And you indicated, I believe, during
your direct testimony, several police officers?
A Yes, ma'am.
Q Correct? And it's a fact, you also had
occasion to compare those prints against the prints
of other individuals, correct?
A They were compared against a number of
individuals, yes.
Q They were not police officers, correct?
A Yes, ma'am.
Q In fact, you compared it against the
prints of a number of known burglary suspects,
correct?

A I don't know what their criminal
background may be.
Q But they were submitted to you?
A A number of names were submitted for
examination, yes.
Q Thank you. I have no other questions,
Your Honor.
THE COURT: Anything else?
RE-DIRECT EXAMINATION

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BY MS. COFFIN:
Q In addition to the police officers, were
you also submitted paramedics' names, to your
knowledge?
A I've got a number of names here but I
don't know what, really what they were for.
Q Of the three unidentified prints that
you had that you said were of comparison value, were
you able to determine that those prints were not the
prints of Florence Lacs?
A Mostly, I'd have to say no, simply
because of the quality that we recovered from her.
Q So that you cannot say that they were
her prints?
A It was an inconclusive examination.
Q So you can't say if they were her
prints?
A That's correct.
Q Thank you.
THE COURT: Anything else?
RE-CROSS EXAMINATION
BY MS. NETHERCOTT:

23 Q Just one brief question, Your Honor.
24 Officer, the prints that you did receive from Ms.
25 Lacs were of comparison value, correct?

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1 A They were of limited comparison value.
2 Q But they were of some comparison value?
3 A I could do some work with them, yes.
4 Q And you didn't find any match up on any
5 of the ridges and the other comparison points that
6 you examined?
7 A That's correct.

* * * *

[WITNESS: DETECTIVE LAWRENCE CHES]
20 BY MS. CO[illegible]IN:
21 Q Detective Ches, what is your position in
22 the Crime Lab Unit?
23 A Mobile Crime Lab technician.
24 Q And what does that mean? What would be
25 your responsibilities if you were in a Mobile Crime

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1 Lab?
2 A Respond to all serious crime scenes such
3 as homicides, shooting, stabbings. That type of
4 crime.
5 Q And whet would be your duties, if you
6 responded to those locations?
7 A To process the scene for prints, to
8 detect, collect and preserve evidence, photographs,
9 sketches.
10 Q I'm going to direct your attention to

11 September 17th, 1988. Did you have occasion to
12 respond to the location of 1951, Apartment C,
13 Woodlawn Drive?
14 A Yes, I did.
15 Q Were there other Crime Lab mobile
16 technicians with you at that time?
17 A Detective Frederick, Sergeant Butt.
18 Q And between the three of you, did you
19 process the entire scene?
20 A Yes, ma'am.
21 Q Detective, when you first entered
22 Apartment C, what did you notice of the condition of
23 that apartment?
24 A It was, as I recall, it was only one
25 light on in the bathroom. It was a little dark

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1 inside. There was some ransacking throughout the
2 apartment.
3 Q When you began the processing, did you
4 make efforts to determine if there was any forced
5 entry into the apartment?
6 A Didn't determine any forced entry.
7 Q But you looked for it?
8 A Yes, ma'am.
9 Q During the course of processing the
10 scene, did you have occasion to make any
11 observations as to household cleaning products?
12 A There were, in the bathroom, there was a
13 bottle of, I believe, Black Flag or a can of Black
14 Flag, container of Top Job, and Sunlight liquid.
15 There were other household items, I believe, for the
16 floor in the kitchen.

17 Q You then processed the kitchen as well,
18 is that correct?
19 A Yes, ma'am.
20 Q While in the kitchen, did you have
21 occasion to note anything unusual in reference to
22 the kitchen sink?
23 A There was a, the kitchen faucet was on.
24 It wasn't running real hard, but it was -- and it
25 wasn't dripping. It was just a light, steady

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1 stream, as I recall. And it was like, I believe, a
2 glass in the sink it was running into.
3 Q During the course of the processing, did
4 you have occasion to make any observations as to
5 wash cloths or towels in the apartment?
6 A I believe there were two wash cloths,
7 wet wash cloths on the dining room table and a damp
8 or wet towel on the bed, I believe.
9 Q Those two that you've said you found on
10 the dining room table, what was the condition they
11 were in when you found them?
12 A They were wet.
13 Q And the towel you said you found on the
14 bed, what was its condition?
15 A It was damp.
16 THE COURT: You say on the hamper in the
17 bedroom. Is that what you said? Or did you say on
18 the bed?
19 A On the bed.
20 BY MS. COFFIN:
21 Q Did there come a time when you removed
22 items from the body of Florence Lacs?

23 A Not me personally, no, ma'am.
24 Q Did the Crime Lab Unit remove any items
25 from Florence Lacs?

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1 A Items from the deceased?
2 Q Um-hum.
3 A Not that I recall.
4 Q I direct your attention to what you have
5 marked item 28-4.
6 A Oh, yes, ma'am.
7 Q Can you describe for the ladies and
8 gentlemen of the jury what this item was and where
9 you found it?
10 A There was a dark piece of thread around
11 the victim's upper, upper arm, left arm.
12 Q And did you, in addition, have occasion
13 to recover any similar item anywhere else in the
14 apartment? Directing your attention to item 28-18.
15 A There was a bag containing several
16 spools of dark-colored thread on the bed in the
17 bedroom.
18 Q Detective Ches, were you involved in
19 collecting the fingerprints that were located or
20 that may have been found in 1951, Apartment C?
21 A Yes, ma'am.
22 Q During the course of processing those
23 prints, did you have occasion to make any
24 observations of unusual markings?
25 A Yes. A few items there, one of the

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household containers, and on, I think, a drawer in the living room, there were what appeared to be one or two digits impressions on those items that appeared to be a wet fabric mark. It wasn't a fingerprint. It was sort of like water spots on a glass from a dishwasher.
Q Now, you said digits. You said you know digits. Can you just tell –
A Well, it appeared to be the shape of fingers.
Q A finger is what you're referring to as a digit mark?
A Yes, ma'am.
Q Saying you believed it to be a finger mark? Were these markings lifted for any comparison purposes?
A No.
Q And why weren't they lifted?
A They don't have any comparison value.
Q Had you, in the course of your experience as a Crime Lab technician, ever seen markings of that nature before?
A Yes, ma'am. Fabric marks. And like I said, these appeared to be wet. They had like little -- trying to think of the word -- water spot

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marks like you would get from a glass in a dishwasher.
Q Based upon your training and your knowledge and your experience as a Crime Lab

technician, did those markings indicate anything to you such that you could draw a conclusion about them?
MR. SCHLAICH: Objection.
THE COURT: Sustained.

* * * *

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* * * *

BY MR. SCHLAICH:
Q Detective, let me show you what has now been marked as Defense Exhibit Three, and the bag's been marked, but I'm worried about the contents. Could you tell me if you've seen that before?
A I believe that was a ball cap on the floor in front of the closet as you come in the front door of the apartment.
Q Okay.
THE COURT: Detective, when you speak, speak into the mike so the jury can hear what you're saying.
A Yes, Your Honor.
Q Would you repeat the answer in case they didn't hear?

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A Okay. It's a ball cap that I believe was on the floor of the apartment in the front of the, front of a closet off to the right as you come in the apartment.
Q In relationship to the front door of Ms. Lacs' apartment, this hat was found within three or four feet, is that correct?
A That's basically right.

9 Q Okay. And it was lying on the floor?
10 A As I recall.
11 Q Officer -- Detective, rather, did you
12 have occasion to look at the windows in the
13 apartment?
14 A Yes, sir.
15 Q And in fact, you found all of them
16 closed except for one that was open slightly, is
17 that correct?
18 A Yes, sir.
19 Q Okay. And that window that was opened
20 slightly, the screen was in place?
21 A The screen was intact, yes.
22 Q There's a sliding glass door in this
23 apartment?
24 A I believe so. Off the other --
25 THE COURT: Keep your voice up, Detective,

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1 so the jury can hear.
2 A I believe there was one off the living
3 room.
4 Q And that sliding glass door was closed,
5 also, correct?
6 A To my recollection it was.
7 Q You stated that there was one light on
8 in the bathroom that you recall. The fan in that
9 bathroom was off, correct?
10 A I don't really remember.
11 Q Okay. Court's indulgence. Your Honor,
12 at this time I would ask that Defense Exhibit Three
13 be allowed into evidence.
14 THE COURT: Defendant's three.

15 (Defendant's Exhibit No. Three, cap, was
16 entered in evidence.)

* * * *

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* * * *

8 (Defendant's Exhibit No. Two, report, was
9 entered in evidence.)
10 MS. COFFIN: Your Honor, in light of the
11 time, I would ask that we get one more stipulation
12 in. This stipulation has been premarked as 35, and
13 I have copies to distribute to the Jury unless
14 there's an objection.
15 THE COURT: Go ahead.
16 MS. COFFIN: The following is the
17 stipulation. It is hereby stipulated and agreed by
18 the State of Maryland and Kevin Wiggins, the
19 defendant, on trial under Criminal Case 88-CR-5464,
20 that the following are true and accurate facts.
21 That a search and seizure warrant was
22 obtained on September 22nd, 1988 authorizing the
23 search of the home of Geraldine Armstrong, that
24 address 4103 Paran Road, Randallstown, Maryland,
25 21133. The warrant was executed on September 22nd,

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1 1988, and recovered from that address, 4103 Paran
2 Road, would be the following items.
3 1-A through E, one infant walker, one
4 infant snow suit, one ladies Cabin Creek sweater,
5 one ladies Cabin Creek corduroy pants, one ladies
6 Cabin Creek Jacket. These items were identified as
7 merchandise purchased from the J.C. Penney's,
8 obtained while using Florence Lacs' J.C. Penney's

9 credit card, Account Number 0146339734.
10 The following items: 2-A through E, one
11 infant 2-piece outfit, one infant dress, one ladies
12 gray jacket and pants, one ladies blouse, one
13 infant's suit.
14 These items were identified as merchandise
15 purchased from Sears, obtained while using Florence
16 Lacs' Sears credit card, Account Number
17 5485648590393.
18 And I would move this stipulation into
19 evidence.
20 (State's Exhibit No. 35, stipulation, was
21 entered in Evidence.)

* * * *

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[BY MS. BROBST:]
23 THE WITNESS: Detective William Michael
24 Crabbs, C-R-A-B-B-S. Currently assigned to the Sex
25 Crimes Unit, Baltimore County Police Department.

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1 DIRECT EXAMINATION
2 BY MS. BROBST:
3 Q Detective Crabbs, how long have you been
4 with the Baltimore County Police Department?
5 A Sixteen years.
6 Q And prior to Sex Crimes, what was your
7 assignment?
8 A Homicide.
9 Q Now, I'd like to direct your attention
10 back in time to December 17, 1988. On that date,
11 did you have occasion to respond to 1951 Woodlawn

12 Drive?
13 A Yes, I did.
14 Q Is that address in Baltimore County?
15 A Yes, it is.
16 Q Would you please tell us what you did
17 when you got there?
18 A Yes. I was advised by Communications at
19 4 p.m. to respond to 1951 Woodlawn Drive, Apartment
20 C. Arrived at the location approximately five
21 minutes after five, and I went to the rear of
22 Woodlawn Drive, which is where the brick apartment
23 building was. The entrance to 1951 is to the rear
24 of Woodlawn Drive.
25 I noticed that it was a brick apartment

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1 building with three levels and there were apartments
2 on each level.
3 There was an entrance door wherein you
4 entered the apartment, was on the first level. I
5 was directed to Apartment C, which was on the first
6 level and the first apartment on the left as you
7 enter the landing.
8 Q Okay. Let me interrupt you for a moment
9 and show you that which has been marked as State's
10 Exhibit Number Two. It's a chart. I would ask you
11 if you can recognize what this represents?
12 A Yes, I can.
13 Q And would you tell us what it is?
14 A Yes. It's, as you enter 1951 Woodlawn
15 Drive, It shows the hallway with Apartment C on the
16 left, Apartment D directly behind that one,
17 Apartment E next to that, and then Apartment F

directly across or almost directly across from Apartment C.
Q Okay. Does this diagram fairly and accurately reflect the hallway at 1951 Woodlawn Drive?
A Yes, it does.
Q I would move it into evidence as State's Exhibit Number Two.

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(State's Exhibit No. Two, diagram, was entered in evidence.)
BY MS. BROBST:
Q I would now ask to you look at that which has been marked at 28-Y for identification at this time. I would ask you if you can identify that photograph?
A Yes, I can.
Q What is it?
A That's the outside picture of 1951 Woodlawn Drive. It's a picture of the apartment building.
Q Is Apartment Number C shown on that photograph?
A Yes, it is.
Q Is it marked that way?
A Yes, It is. It's marked on the entrance way and marked with a C.
Q And is Apartment F on that photograph?
A Yes, it is.
Q And is it marked in any way?
A Yes, to the right of the entrance door and marked with an F.

Q Does this photograph fairly and accurately reflect the apartment entrance way to

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1951 Woodlawn Drive?
A Yes, it does.
Q Move into evidence as State's Exhibit Number 28-Y.
(State's Exhibit No. 28-Y, photograph, was entered in evidence.)
BY MS. BROBST:
Q To your knowledge, on September 15th, 1988, was Apartment F an occupied or vacant apartment?
A It was a vacant apartment.
Q What did you do after you made your initial observations?
A After I made the hallway observation, I checked with the Crime Lab Detective Roy Frederick, if it was safe to enter the scene, at which time he stated it was and at which time I entered the scene.
Q Did you make any observations about the entrance way?
A Yes, I did. When I approached the apartment itself, I noticed that there was a door which was tan in color and it had a brass colored C at eye level in the center of the door just above the peephole.
Also, I noticed that door opened to the

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right and it had two locking mechanisms. One was a

single cylinder dead bolt, brass in color, and the other was a double lock, door type lock.
Q Did any of those locks appear to be tampered with in any way?
A No, it did not.
Q Did you have occasion to examine the door frame?
A Yes, I did.
Q How did that appear?
A Yes. It appeared normal.
Q I show you 28-B and ask you whether you can identify that?
A Yes. That's a photograph of Apartment C's door as you would view it from standing in the hallway.
Q Does it appear to you to accurately reflect the door as it appeared to you on that date?
A Yes, it does.
Q I show you that which has been marked as State's Exhibit Number 28-A. Can you identify that photograph?
A Yes, I can. This is a photograph of when you first enter into the landing from the outside door, It's a view looking down the hallway.

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Apartment C would be the first opening on the left and then directly behind that would be Apartment D.
Q And does this photograph also truly and accurately represent the hallway as it appeared on that date?
A Yes, it does.
Q I would move both of these photographs

into evidence at this time.
(State's Exhibit No. 28-A and 28-B, photographs, were entered in evidence.)
BY MS. BROBST:
Q After making these observations of the door and the entry way, did you enter the apartment?
A Yes, I did.
Q And what did you observe?
A I observed that when you first enter the apartment, you enter into the living room/dining room type combination area. You're entering into the living room itself. The two rooms are not separated but a combination-type room.
Just inside the doorway, I noticed that there was a small oval braided multicolored rug.
And just to the left of the inside door was a rocker-type recliner, orangish-brown in color. I noticed that the chair faced southeasterly

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direction, facing two television sets.
Q Those television sets, did they appear to you to be tampered with or moved in any way?
A No, they did not. I also --
Q I'm sorry. What else did you observe?
A I observed that located on top of a table to the left of the chair was a marble and wood end-type table, and located on top of the table there was a beige-colored rotary dial telephone displaying the telephone number of 298-6098.
Also on top of the table was a small pair of scissors in the closed position and a silver-colored fingernail file. Next to that was a

14 stack of five paperback books.
15 Q Do you know the titles of those books?
16 A Yes.
17 Q What are they? Can you identify them?
18 A If Tomorrow Comes, Suspects, The Moth,
19 The Prince and the Darkness, and Fleeting Images.
20 Q I'm now going to show you some
21 photographs, Detective. The first photograph which
22 I would ask you to view was that which has been
23 marked as State's Exhibit 28-C. I would ask you to
24 look at the photograph, tell me whether you can
25 identify it?

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1 A Yes, I can.
2 Q What is it?
3 A This is a photograph, if you were
4 standing in the living room looking toward the
5 entrance door, that's the view you would get from
6 that particular view. It shows the rocker chair,
7 the end table, and the picture of the telephone, a
8 stack of books, a table lamp and part of the picture
9 of the sofa.
10 Q Okay. And there's an object lying on
11 the floor Just inside the door. What is that?
12 A Yes. That's a Ryder Rent-A-Truck hat,
13 black and white in color, with a Ryder logo in it.
14 Q Baseball type hat?
15 A Yes, ma'am.
16 Q Next, I'd ask you to look at 28-D.
17 A This is a photograph looking from the
18 dining room area toward the living room area,
19 showing the same rocker/recliner chair, the end

20 tables, with the telephone, stack of books and a
21 lamp again, the sofa with the drawers sitting on top
22 of the sofa. Those drawers matched the end tables
23 located on each side of the sofa and were from the
24 end tables. The contents of those drawers were
25 apparently spilled on the sofa itself. Also the

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1 coffee table, braided rug and the curtains which
2 were hiding the sliding glass doors.
3 Q State's Exhibit 28-F.
4 A This is a closer shot of the coffee
5 table which was located in front of the sofa, and
6 the drawers which were also out of the end tables,
7 that were setting on the sofa and the contents.
8 Q What were the contents, if you recall?
9 A There were several envelopes with
10 various type of bills. There was a Webster's
11 dictionary. Just personal-type items that were
12 written on and placed on the sofa.
13 Q Any currency or anything like that?
14 A No. None.
15 Q And State's Exhibit Number 28-G
16 A State's Exhibit 28-G shows a photograph
17 looking from the area of the entrance door towards
18 the area of the living room, which indicates the
19 braided rug, the coffee table, located in front of
20 the sofa, the two television sets, a floor plant
21 which is located in the one corner, a hassock, and
22 another chair located to the right of the television
23 sets.
24 Q Are these the television sets you've
25 previously described in your testimony?

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A Yes, they are.
Q Do these photographs truly and
accurately represent the apartment as it appeared on
that date?
A Yes, they do.
Q I would move to introduce these into
evidence at this time.
(State's Exhibit Nos. 28-C, 28-D, 28-F,
28-G, photographs were entered an evidence.)
BY MS. BROBST:
Q Directing your attention, again, to
State's Exhibit Number 28-F. There's, as you
described, a marble-topped coffee table. Did you
make any observations about anything that was on
that coffee table?
A Yes, I did. There was a floral
arrangement, back scratcher, a box of Kleenex, and
there was TV Guides, two TV Guides located on the
coffee table itself.
Q Did you examine those TV Guides,
Detective?
A Yes, I did.
Q What did you observe?
MR. SCHLAICH: Objection.
THE COURT: Overruled.

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A I observed that there were two TV
Guides, one for the current week which was dated
9/10 to 9/16, 1988. The second TV Guide was dated
9/17 to 9/23, 1988. And I observed that there was a

book marker in the TV Guide dated 9/10 to to 9/16,
1988, which the marking was for the evening listings
of Thursday, 9/15, 1988.
Q Did you look at the rest of that week
and the following week to see if they were marked in
any way?
A Yes, I did.
MR. SCHLAICH: Objection.
THE COURT: Overruled.
Q And what did you observe?
MR. SCHLAICH: Objection.
THE COURT: Overruled.
A I observed that there were listings for
each of the dates prior to the 15th. There were
markings beside the shows apparently indicating that
there were markings --
MR. SCHLAICH: Objection.
THE COURT: Sustained. Just tell us what
you saw, not your conclusion.
A Yes, sir. I observed markings beside
the evenings' listings and programs up to the 15th,

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but none after that.
Q Okay. How about the 15th itself?
A The 15th itself --
MR. SCHLAICH: Objection.
THE COURT: Overruled.
A The 15th itself, I can't recall whether
it was marked.
Q Okay. Where was the book marker?
A The book marker was in the date of the
15th.

11 Q Okay. What other observations did you
12 make of the apartment?
13 A On the east wall, there was a sliding
14 glass door which had multicolored curtains hanging
15 in front of them. The drapes were closed. Upon
16 viewing the door, it was found to be locked and the
17 charlie bar was in place.
18 Q What's a charlie bar, for the people on
19 the jury who don't know?
20 A The charlie bar is an additional locking
21 bar in addition to a handle-type lock which is
22 located beside the handle for sliding the door
23 open. The charlie bar would be a bar that would
24 come from the non-opening side to keep the opening
25 door from opening when it was put in place.

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1 Q Did you go out on the little balcony?
2 A Yes, I did.
3 O And did you make any observations out
4 there?
5 A Yes, I did. The sliding glass doors led
6 out onto a brown painted wooden-floored porch, which
7 had a layer of dust covering the painted surface.
8 The dust, when observed, appeared to be undisturbed.
9 Q Now, did you have time -- did there come
10 a time when you entered the dining room of this
11 apartment?
12 A Yes, I did. The dining room was
13 adjacent to the living room and, as I stated before,
14 it was a living room/dining room type combination.
15 Q I'm going to show you some additional
16 photographs.

17 The first photograph to which I would
18 direct your attention is photograph 28-I. I would
19 ask you to look at that photograph and tell me
20 whether you can identify it.
21 A Yes, I can.
22 Q And what does it depict?
23 A Depicts a chest of drawers and the
24 dining room area with the drawers slightly opened,
25 one completely pulled out, and there's another one

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1 pulled out to where it's just hanging on the edge
2 there.
3 Q It also shows, if we could hold it up,
4 an empty place. Did you find that drawer?
5 A Yes.
6 Q Where was that?
7 A That was located on the dining room
8 table.
9 Q Photograph 28-H?
10 A This is a shot of the or photograph of
11 the dining room as you view it from walking into the
12 doorway. Shows a dining room table with chairs
13 around it. Shows the drawer which was in the
14 previously described chest of drawers, and several
15 other personal items on the table. There were also
16 some letters and bills that were banded by rubber
17 bands sitting outside the drawer on the table
18 itself.
19 Q And State's Exhibit 28-J.
20 A 28-J, again, shows a picture or
21 photograph from the entrance door into the dining
22 room area, showing the dining room table and also a

23 lady's white slipper-type shoe located on the wooden
24 floor right behind the dining room chair.
25 Q And did you find the match to that shoe?

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1 A Yes, I did.
2 Q Where was it?
3 A On the victim who is located on there.
4 THE COURT: I'm sorry?
5 A Was located in the tub along with the
6 victim.
7 Q Do these three photographs truly and
8 accurately represent the dining room area as it
9 appeared to you on that date and time?
10 A Yes, they do.
11 Q Move to introduce these into evidence at
12 this time.
13 (State's Exhibit Nos. 28-H, 28-I, and
14 28-J, photographs, were entered in evidence.)
15 BY MS. BROBST:
16 Q Now, before we leave the living room,
17 dining room area, I think I neglected to ask you.
18 Did you have a chance to look at the TV Guide that
19 was dated for the week, the week of the 17th of
20 September, 17th through the 23rd?
21 A Yes, I did.
22 Q And did you notice any markings or
23 anything unusual about that book?
24 A No, I didn't.
25 MR. SCHLAICH: Objection.

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1 THE COURT: Overruled.
2 MR. SCHLAICH: Move to strike.
3 THE COURT: Overruled.
4 Q Tell us exactly what you did observe
5 about that book.
6 A I looked at the book. I found that
7 period to be undisturbed. It appeared as though it
8 was new.
9 Q Now, you described a hallway in the last
10 photograph. Did you go down that hallway?
11 A Yes, I did.
12 Q And where did it lead?
13 A The hallway led down to the kitchen on
14 the left, the bathroom on the right, and all the way
15 located to the rear of the residence was the
16 bedroom.
17 Q Okay. Did you go down the hallway into
18 the bedroom?
19 A Into which room?
20 Q The bedroom?
21 A Yes, I did.
22 Q I'm sorry. I should keep my voice up.
23 I'll show you that which has been marked
24 as State's Exhibit Number 28-K and ask you to look
25 at that photograph and tell me whether you recognize

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1 it?
2 A Yes, I do.
3 Q What is it?
4 A That's a photograph, as you proceeded

down the hallway, at the entrance to the bathroom, which would be on the right, and directly behind that would be the entrance to the bedroom. It's a photograph of a multi-colored rug with a brown-colored valuable cash-type box, with its contents apparently spilled on to the rug.
Q Okay. State's Exhibit Number 28-L.
A Yes. This is a photograph of the bedroom itself as you're viewing it from, after you walk into the door, as you're viewing it from the opposite side of the bed looking towards the closet. And a chair which was located in the bedroom, along the corner. In the corner of the picture, you can see the dresser drawers in the lower left.
Q And what's the condition of those dresser drawers?
A They're pulled out.
Q State's Exhibit Number 28-M.
A This is a photograph as you view the bed from in the bedroom. Also the night stand, which is

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located next to the bed with it drawer pulled out. Located on top of the bed, there was a drawer that was found to have been removed from the dresser drawers across from it. The bed appeared to be disarrayed. There were several items laying on top of the bed.
Q State's Exhibit 28-N.
A That's another photograph of the bed itself with contents laying on the bed.
Q Okay. Now, in this photograph, there's

a black suitcase with a red tag on it. Can you tell the members of the jury what that is?
A Yes. That suitcase belongs to the Crime Lab person who took the photographs at my direction.
Q And finally, in the bedroom, State's Exhibit Number 28-O.
A Yes. That's a photograph of the jewelry box with its lid raised with several inexpensive pieces of jewelry located in them. Also, there's a strand of pearls located on top of the dresser itself. There were two small, heart-shaped cache-type boxes on each side of that which had their lids removed.
Q And do these photographs truly and accurately depict the bedroom at that apartment as

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it appeared on that date?
A Yes, they do.
Q Move to introduce them into evidence at this time.
(State's Exhibit Nos. 28-K, 28-L, 28-M, 28-N, and 28-O, photographs, were entered in evidence.)
BY MS. BROBST:
Q Court's indulgence for a moment. I'm sorry.
Now, did there come a time that you left the bedroom that you described and entered the bathroom?
A Yes, I did.
Q Can you describe what you observed in the bathroom?

17 A Yes, the bathroom was located down the
18 hall on the right-hand side. It was directly south
19 of the south wall of the dining room.
20 I found that the door was open and it
21 opened to the left. And I found hanging from a
22 small white hook on the back of the door was a pink
23 nightgown. Behind the door and on the south wall
24 was a bar-type towel rack. I found neatly hanging
25 on the towel rack was a yellow towel and a smaller

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1 pink towel. These items appeared to be unremarkable
2 and undisturbed.
3 Next to the towel rack was a small linen
4 closet with its door open. There were several
5 personal hygiene products located on various shelves
6 inside the closet itself and none of those items
7 appear to be disturbed.
8 The bath tub enclosure was located against
9 the west wall between the north and south wall. And
10 it was white ceramic tile on three of the walls,
11 which encased the bath tub. Hanging from a metal
12 shower curtain rod was a dark green plastic shower
13 curtain which was pulled to the left side of the
14 tub. The curtain appeared to be unremarkable.
15 There was an orange wash cloth on the edge
16 of the tub near the south wall and near the north
17 wall draped over the edge was a small bathroom-type
18 throw rug which was green in color.
19 On the west wall was a soap dish with a
20 green wash cloth. The drain on the tub was closed.
21 There were three chrome bathroom control knobs on
22 the north wall, one for the hot water, which was on

23 the left, cold water which was on the right, and the
24 knob in the middle which controlled the water flow
25 on the shower head to the spout.

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1 The middle, upon directing the middle
2 control knob, I observed that the water directed the
3 flow of water down towards the tub. There was a
4 shower head located just above the ceramic tile on
5 the fourth tile and there was a control knob which
6 allowed the water to flow either down the drain or
7 fill the tub. The control knob was in the position
8 which stopped the flow of water from going down the
9 drain.
10 I observed the bath tub was approximately
11 half full of water. And upon viewing the water I
12 observed the water was cloudy and had a slight
13 greenish color to it. I observed that the victim
14 was lying in the tub on her right aide, with her
15 head at the north end and her feet at the south
16 end. The left side of her body was exposed above
17 the water and the right side was submerged.
18 Observed that she appeared to be a white
19 female in her seventies and that her hair had a
20 light reddish-brown color in it and it was thinning.
21 Q Did you observe anything around her
22 mouth, her nose and mouth?
23 A I observed around the nose and mouth
24 that there was a froth or a mucus froth flow from
25 her nose and mouth.

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1 Q And was she wearing any jewelry?
2 A Yes, she was. She was wearing a white
3 bead-type necklace around her neck and she was
4 wearing a wrist watch.
5 Q Was the watch running?
6 A Yes, it was.
7 Q Did you notice whether there was any
8 footwear on her at any time?
9 A Yes. Her legs were bent at the knee,
10 left leg on top of the right leg, and the right
11 slipper which matched the previously described
12 slipper that was located on the floor on the hall
13 was found upside down in the bath tub at the
14 victim's feet.
15 Q And how was she otherwise attired?
15 A She had a white blouse on and a green
17 skirt.
18 Q And describe the condition of the green
19 skirt.
20 A It was pulled up and her buttocks were
21 exposed.
22 Q Was she wearing underwear?
23 A No, she was not.
24 Q I'm going to show you some photographs,
25 Detective.

* * * *

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* * * *

23 BY MS. BROBST:
24 Q Detective, beginning with State's
25 Exhibit Number 28-P, and referring to the exhibit

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1 numbers on the back, could you please look at these
2 photographs and describe them for the jury?
3 A Sure. Beginning with 28-P, this would
4 be a photograph of the victim as she was lying in
5 the bath tub upon my viewing her. Shows the green
6 rug, the green wash cloth, her skirt, blouse, and
7 that the tub is halfway full, stopper is down.
8 Q Okay. 28-Q?
9 A 28-Q Is another photograph a little bit
10 further away. Again showing the victim as she laid
11 in the bath tub. The green shower curtain is viewed
12 also in this photograph, along with the toilet and a
13 drying rack, a hang drying rack next to the toilet.
14 Q 28-R.
15 A 28-R, upon viewing this photograph, this
16 particular location, the victim had been removed
17 from the tub and I observed on her left hand there
18 was a bruise located on the hand near the thumb.
19 And also her wrist watch is observed in this
20 photograph.
21 Q 28-S.
22 A 28-S was of the victim's right arm, also
23 showing some bruising to the forearm area.
24 Q 28-T.
25 A 28-T is another photograph of the

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1 victim's right arm, again indicating some bruising.
2 Q 28-U.
3 A 28-U is another photograph of the victim
4 after she was removed from the tub. The photograph

shows the mucus that was flowing from the victim's nose and mouth after she was removed from the tub.
Q And 28-V.
A 28-V is another photograph of the victim around the head area, shows some slight bruising to the right side of the neck.
Q And 28-W.
A 28-W shows the condition of the tub after the victim was removed. Shows that there was another towel also in the water and there was a little bit of soap or sudsy-type action on top of the water.
Q Do these photographs truly and accurately depict the bathroom of the apartment as it appeared to you on that date?
A Yes, they do.
Q I would move to introduce these into evidence at this time.
MR. SCHLAICH: I would object, Your Honor, with the exception of 28-W, to which I have no objection.

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THE COURT: Overruled.
(State's Exhibit Nos. 28-P, 28-Q, 28-R, 28-S, 28-T, 28-U, 28-V, 28-W, photographs, were entered in evidence.)
BY MS. BROBST:
Q I'm now going to show you State's Exhibit Number 28-X and ask you to describe the sink that's portrayed in this photograph.
A Okay. The sink was located on the right wall as you walk into the bathroom. It had several

items located on top of the sink, one of them being a bottle of Top Job type cleaner. There was a can of Black Flag insect repellent, and there was a bottle of Sunlight dish washing liquid.
Q Does this photograph truly and accurately depict this portion of the bathroom as it appears on that date?
A Yes, it does.
Q I would move to introduce this into evidence at this time as State's Exhibit 28-X.
(State's Exhibit No. 28-X, photograph, was entered in evidence.)
BY MS. BROBST:
Q Referring to these items which you just described, I would like to now show you what has

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been marked for identification as State's Exhibit Numbers 38, 39 and 40.
I would ask you to look at these items and tell me whether you can identify them, beginning with item number 38.
A Yes. Item number 38 is the Sunlight dish washing bottle that was recovered off the sink.
Q And does it appear to you to be in substantially the same condition as it did on that date?
A Other than the fingerprint dust, it was dusted for prints. Yes, other than that.
Q So you mean that black soot on it?
A Yes.
Q What's that again?
A Fingerprint dust.

17 Q That was not on it when you recovered
18 it?
19 A No, it was not.
20 Q Move to introduce this into evidence as
21 State's Exhibit Number 38.
22 (State's Exhibit No. 38, photograph, was
23 entered in evidence.)
24 BY MS. BROBST:
25 Q State's Exhibit 39?

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1 A Yes. State's Exhibit Number 39 was the
2 Top Job bottle also located on the sink. Again has
3 the fingerprint dusting powder on it which was not
4 on it when originally observed.
5 Q And State's Exhibit Number 40?
6 A State's Exhibit Number 40 was the Black
7 Flag ant and roach killer which was also located on
8 the sink. Appears in the same condition, except for
9 the black fingerprint dust again.
10 Q I would move at this time to introduce
11 State's Exhibit Numbers 39 and 40 into evidence.
12 (State's Exhibit Nos. 39 and 40,
13 photographs, were entered in evidence.)
14 BY MS. BROBST:
15 Q On the bed in the bedroom, can you tell
16 us what articles belonging to the victim that you
17 observed?
18 A There was a red change purse which was
19 empty, and there was also a pocketbook that was
20 empty located on the bed. When you moved some of
21 the items that were on the bed, that's where they
22 were located.

23 Q Okay. The pocketbook, was it open or
24 closed?
25 A It was open.

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1 Q Now, also in one of these photographs is
2 a small hamper, and I would show you State's Exhibit
3 Number 28-L. Do you see the hamper in that
4 photograph?
5 A Yes, I do.
6 Q Is it marked in any way?
7 A Yes, has a circle around it.
8 Q Did you examine the contents of that
9 hamper?
10 A Yes, I did.
11 Q And what did you find?
12 A Have to pardon me for a minute until I
13 find where my notes are.
14 Yes. I noticed that upon viewing the
15 hamper, it was a small white hamper, and upon
16 viewing the contents, there were three small kitchen
17 towels, a pink blouse, and a pair of yellow
18 panties.
19 Q Did there come a time when you left the
20 bathroom and went into the kitchen area?
21 A Yes, I did.
22 Q And can you tell us what you observed at
23 that location?
24 A Yes. In the kitchen when you walked in,
25 there was a table and, on the left wall, with two

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chairs. There was also, on the right, all the kitchen utensils, the faucet and the stove, the sink and all. And found there, the cabinets underneath of the faucet were open at that particular time.
Q And I'll show you what has been marked as State's Exhibit Number KK, 28-KK, and I would ask you to look at that and tell me whether you can identify it.
A Yes, I can.
Q And what is it?
A That's a photograph of the kitchen as you view it from the hallway, showing that the cabinet was open on the bottom with a bottle of fabric softener and a bottle of Sunlight dish detergent, and also that the faucet was running slightly as you viewed It from that angle.
Q And State's Exhibit Number 28-JJ?
A Yes. That is a photograph looking from the hallway into the kitchen, showing the table with the various items located on the top, and some chairs located in the kitchen itself.
Q Does that photograph truly and accurately depict the scene as it appeared on that date?
A Yes, it does.

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Q And does 28-KK?
A Yes, it does.
Q I would move into evidence at this time State's Exhibit Number 28-JJ and KK.

(State's Exhibit Nos. 28-JJ and 28-KK, photographs, were entered in evidence.)
BY MS. BROBST:
Q Your Honor, the State would like to have an opportunity to show the photographs to the jurors who have heard testimony about them. We could do that now or at the end of direct of this witness. I just thought while it was fresh in their mind, I would make that request.
THE COURT: You wish to do it now?
MS. BROBST: Yes, Your Honor.
THE COURT: All right.
(Pause.)
BY MS. BROBST:
Q Detective, did you have occasion on September 21st, 1988, to have a conversation with Jeanetta Washington, a sales clerk at the J.C. Penney store in the Security Square Mall?
A Yes, I did.
Q And based on that conversation, did you return To Security Square Mall to the J.C. Penney

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store on September 22nd, 1988?
A Yes, I did.
Q Now, I'm going to show you two exhibits which have been marked as State's Exhibit Numbers 17 and18 at this time. I'll ask you whether you can identify those exhibits. First, number 17.
A As State's Exhibit Number 17, it shows a client card that Mrs. Washington gave to, she said was filled out on the previous time by a person who identified himself as Kevin Jackson, of 4042 Finney

11 Avenue.
12 Q Okay. And State's Exhibit Number 18.
13 A State's Exhibit Number 18 is the diamond
14 certificate that she filled out when there was a
15 ring that was purchased by the individual. It was
16 indicated the date was September the 16th, 1988 and
17 the name of Florence J. Lacs. The description of
18 the ring that was purchased was a 14 karat diamond
19 cluster with a Stock Number of 244100. The owner's
20 address as indicated on the form was 1951 Walnut
21 Avenue with a zip code of 21229. The total diamond
22 weight on the cluster ring was a .13 and it was
23 priced at $350.
24 Q Okay. And did you have occasion to
25 check and see whether, in Zone 21229, there is an

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1 address of 1951Walnut Avenue?
2 A Yes, I did.
3 Q Is there?
4 A No, there's not.
5 Q Do these two items, State's exhibit --
6 well, is State's Exhibit Number 17 in substantially
7 the same condition as it was when you recovered it?
8 A Yes.
9 Q And does State's Exhibit Number 18
10 accurately reflect the diamond certificate as it was
11 when it was shown to you on that date?
12 A Yes, it does.
13 Q Move to introduce at this time 17 and
14 18.
15 (State's Exhibit Nos. 17 and 18, client
16 card and diamond certificate, were entered in

17 evidence.)
18 BY MS. BROBST:
19 Q Now, with respect to the Kevin Jackson
20 and the address of 4245 Finney Avenue, did you do
21 anything with that address?
22 A Yes, we did.
23 Q The address was 4542 Finney Avenue, but
24 It was no zip code noted and the telephone number
25 was 664-9292. We checked the 1988 Baltimore City

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1 criss-cross, indicated the occupants of the address
2 of 4542 Finney Avenue was a Tyrone Hopkins and the
3 phone number at that address was 466-5491. Then
4 checked with C&P Telephone Information and they
5 revealed a change from 664-9292 to a new phone
6 number of 667-4509. The new phone number was a
7 non-published number in the Cockeysville area.
8 We also checked for Kevin Jackson or K.
9 Jackson in that area and she said she didn't have
10 any listed in that area, and there was no Tyrone
11 Hopkins listed.
12 Q What did you do with the name, Tyrone
13 Hopkins? Did you perform any investigation of that
14 name?
15 A Yes. Checked into Tyrone Hopkins to see
16 if he'd ever been arrested before and found that he
17 had and compared his prints against prints that were
18 recovered at the scene. If there were any, we
19 submit that name.
20 Q So you submitted that name to Crime Lab?
21 A Yes.
22 Q For a print comparison?

23 A That's correct.
24 Q Now, I want to direct your attention
25 forward in time to September 26, 1988. Did you have

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1 an occasion to meet with Chianti Thomas on that
2 date?
3 A Yes, I did.
4 Q And what was your purpose of meeting
5 with her?
6 A I'd received information that she
7 possibly may have observed somebody in the hallway
8 in the 1951 apartment building. So I interviewed
9 her to see if she could provide any information.
10 Q Did you take anything with you for your
11 interview?
12 A Yes, I did.
13 Q And I'm going to show you that which has
14 been marked as State's Exhibit Number 45 and ask you
15 whether you recognize this?
16 A Yes, I do.
17 Q And what is that?
18 A That's a photo show, we conducted a
19 showing of six photographs of individuals. They're
20 all similar in appearance.
21 Q Okay. And this is in a folder with
22 photographs stapled and pieces of manila paper also
23 stapled in place. Is this the way it was when you
24 took it with you on September 26?
25 A Yes, it is.

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1 Q And did you show this to Chianti Thomas?
2 A Yes, I did.
3 Q What did you ask her to do?
4 A Well, I asked her to explain to me what
5 she had observed on that day and she did. And I
6 asked her if she would mind viewing the photo show
7 to see if the person she had observed in the hallway
8 may be contained in the photo show. I told her I
9 wasn't sure if there would be anybody in there she
10 would recognize, but If she would look at the
11 photographs for me.
12 I then asked her to look at the
13 photographs, which she did. She indicated to me
14 Photograph Number Two. I then filled out a
15 photograph or photo identification summary form,
16 which is a form used by the Baltimore County Police
17 Department, upon conducting a photo show, and asked
18 her if she would put the number in, at which time I
19 wrote the number on which number she chose.
20 And then I asked her if she had any
21 comments she wanted to make at the bottom of the
22 form. There's a place for that. She said
23 Photograph Number Two. She said, not for sure. I
24 said, you can write that on the photograph if you
25 like, which she did. Then the witness comment,

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1 that's the closest to the man I saw. Then she
2 signed and dated the form.
3 Q Thank you. And does this folder appear
4 to you to be in substantially the same condition as

it was on the date you showed it to Chianti?
A Yes, it does.
Q And who is Photograph Number Two a photograph of?
MR. SCHLAICH: Objection.
THE COURT: Overruled.
A Photograph Number Two is a photograph of the defendant, Kevin Wiggins.
Q Is that person in court today?
A Yes, he is.
Q Would you indicate where, please?
A Seated at defense table.
Q Indicating for the record, the defendant. I would move to introduce State's Exhibit Number 45 into evidence.
MR. SCHLAICH: Objection.
THE COURT: Overruled.
(State's Exhibit No. 45, photo card, was entered in evidence.)
BY MS. BROBST:
Q Now, Detective, I want you to recall, if

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you would, please, Wednesday night, September 21st, 1988, approximately 11 p.m. Did you get a call that night to go to the Woodlawn station?
A Yes, I did.
Q And did you go to the Woodlawn station?
A Yes, I did go.
Q What happened upon your arrival?
A I was advised that the victim's orange Chevette had been stopped by two officers that worked the Woodlawn district, at that time Corporal

Dennis O'Neill and Officer Coburn, and that the occupants of the vehicle have been taken to Woodlawn station.
Myself and my partner, Detective McDonald, responded to the station. Upon walking into the station, I was advised that the subject that was driving the vehicle was located in an interview room, which is located behind the desk area, and that there was a uniformed officer standing by with him.
I then walked into the interview room and observed that there was a black male there along with the uniformed officer and that the subject had been patted down and the contents of his pockets had been placed on to the table.

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Q Who was that person.
A The person is the defendant, Kevin Wiggins, seated at the defense table.
Q And was his driver's license there on the table?
A He had a wallet there, which the driver's license was contained in.
Q Was it a photo driver's license?
A Yes, it was.
Q I'm going to show you that which has been marked as State's Exhibit Number 19.
THE COURT: You say 19?
Q 19, yes, sir. And ask you to look in this envelope and tell me whether you can identify the content?
A Yes. This is a J.C. Penney card with

17 Jeanetta Washington's name, Fine Jewelry Department,
18 J.C. Penney, 6901 Security Boulevard, Baltimore,
19 Maryland, a telephone number of (301) 298-8100.
20 Q And from whom was that recovered?
21 A Recovered from the defendant.
22 Q Was anything else recovered from the
23 defendant initially right there, in addition to the
24 client card?
25 A In addition to the client card, he had

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1 some jewelry that was taken off of him and placed
2 for safekeeping.
3 Q Okay. And I'll now show you that which
4 has been marked as State's Exhibit Number 32 and ask
5 you whether you can identify the contents of this
6 envelope?
7 A Yes. This is a bill of sale and option
8 to repurchase from Samuelson's Boston Loan Office,
9 which was in the defendant's wallet along with his
10 driver's license. It's indicated an address of 426
11 West Baltimore Street at Paca Street and Baltimore;
12 shows it was in the name of Geraldine M. Armstrong,
13 and it shows that the expiration date was 12/16/88.
14 It shows that the following item was sold
15 and delivered to Boston Loan Office on 9/17/1988,
16 and it indicated the description of the property as
17 one diamond ring with a loose stone and the purchase
18 price of $50.
19 Q Okay. And what do we refer to this as,
20 just in common jargon?
21 A A pawn ticket.
22 Q Does this exhibit, State's Number 32,

23 appear to you to be in substantially the same
24 condition as it was on the date that you took it
25 from the person of the defendant?

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1 A Yes, it is.
2 Q Move to introduce it into evidence at
3 this time.
4 (State's Exhibit No. 32, bill of sale, was
5 entered evidence.)
6 BY MS. BROBST:
7 Q Now, when you met the defendant at
8 Woodlawn, approximately what time was it that you
9 met him?
10 A It was approximately midnight, just
11 before, just prior to midnight. It was about 11:50.
12 Q On the 21st?
13 A Yes.
14 Q And did you give him any rights at that
15 time?
16 A I explained to him what we'd like to, if
17 he didn't mind, transport him to Headquarters and
18 talk to him about the car he was driving.
19 Q And did he agree to do so?
20 A Yes, he did go.
21 Q Did you return to Headquarters?
22 A Yes, we did.
23 Q Where did you go when you got there?
24 A When we got there, we walked into the
25 lower back lot of Headquarters and we arrived at

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0025 hours, which was 12:25 a.m., and we walked into the Sex Crimes Office, which is a normal business-type office with desks and chairs and telephones.
I asked him to have a seat and sit down in the chair, asked him if he wanted anything. And at 0035, he asked for and received one cup of coffee with cream and sugar.
Q Now, did he make any requests of you that were not honored?
A No, he did not.
Q And how were you dressed?
A In the normal business suit, such as I am now.
Q Were you armed?
A Yes.
Q How about your partner, Detective McDonald? How was he dressed?
A The same way.
Q And was he carrying his service revolver?
A When we walk in, we're required to take our gun out of our holsters and place them into a locked locker which is there for officers' safeties. And that's what we did, placed them into

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the locker and removed the key.
Q What were the temperature conditions?
A It was comfortable.
Q The lighting?

A Normal lighting such as it is in the courtroom.
Q Now, at that time did you give the defendant any rights?
A No. He was then, at five minutes after one, he was brought into the captain's office and unhandcuffed. And then at 1:15, I explained to him I would like to speak to him about the car he was driving. He said okay. At 1:15 I read him his Miranda rights.
Q Did you use anything to help you do so?
A Yes, I did.
Q This has been marked as State's Exhibit Number 44. And I would ask you to look in that envelope and see whether you can identify the contents.
A Yes. This is the Miranda warning card that I read to Kevin Wiggins at 115 hours on that date.
Q Would you please show the members of the jury how you did that, how did you read him his

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rights?
A I removed the card from my pocket and advised him that he had, you have the absolute right to remain silent; that anything you say can and will be used against you in a court of law; that you have the right to talk to an attorney before you are questioned and have him present thereafter. If you cannot afford an attorney, one will be appointed by the Circuit Court immediately before any questions are asked. If you desire to answer any questions,

you can at any time insist upon all your rights, at which time all questioning will cease and no further questions will be asked.
I then turned the card over and read the Miranda waiver on the back. I asked him if he, I said, do you understand each of the rights I've explained to you. He indicated that he had. I asked him, having these rights in mind, do you wish to talk to us now. He indicated that he did.
I then asked him if he would initial and date the card. I turned it over. He initialed it KW on the lower right-hand corner and wrote the date of 9/22/88.
Q Because by that time it was after midnight?

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A Yes, it was.
Q After he agreed to waivē his rights and talk to you, what did you do?
A At 1:17, he was -- at 1:15, he was read the Miranda rights and then he waived them and signed the card. He was read and signed a waiver of rights and gave a statement. A waiver of rights is a different form than that of the Miranda card. It basically spells out the same rights again but again they were written, they were re-read to him.
Q At this time, I show you that which has been marked as State's Exhibit Number 41. I would ask you whether you can identify that?
A Yes, I can.
Q What is it?
A This is the copy of the waiver that I

read to Kevin Wiggins.
Q How did you read it to him?
A Well, first off, I filled in the top. I asked him his name and he said Kevin. I said do you have a middle name; he said no. He said Wiggins, that was his last name.
Told me his age was 26. I filled in his date of birth, which he gave me was 9/2/61. I asked him if he read and wrote; he said yes. I asked him

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his education level. He said tenth completed, and then GED from CCB.
I asked him where he was residing at and he indicated none. I then, having been informed by detective or Officers Crabbs and McDonald that they desired to interview him regarding the vehicle he was driving. I then read him rights starting as, listed as number one.
Officers Crabbs and McDonald have informed you that you have the absolute right to remain silent and you cannot be compelled to answer any questions, and need not assist their interrogator's in this or any investigation.
Two, Officers Crabbs and McDonald have informed me anything I say can and will be used against me in a court of law.
Three, Officers Crabbs and McDonald informed me that I have an absolute right to my own attorney to assist, advise and protect my rights. I have further been informed that this right to my attorney exists before any questions are asked of me.

Four, Officers Crabbs and McDonald informed me that if I desire but cannot afford the service of an attorney, no questions will be asked

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of me and that the Circuit Court will appoint an attorney for me.
Five, Officers Crabbs and McDonald have informed me that if I desire to be interviewed, thus waiving my rights, I may at any time during the interview, then and refuse to be interviewed or questioned any further, and insist upon my constitutional rights which will be promptly complied with.
Six, the aforementioned rights have been read aloud to me by Officers Crabbs and McDonald, I then handed Mr. Wiggins a form, asked him if he would please read it over, if he had any questions, he could ask; that asked him after he read it if he would read number seven, which says, "I have read this waiver which sets forth my constitutional rights" and check yes or no, which he checked yes,. And then number 8, "without threats, promises, force or duress, I do hereby waive my rights as set forth and do knowingly and voluntarily agree to be questioned and/or make a statement."
I asked him to sign it, which he did. And I witnessed it myself, and then my partner, Detective McDonald, witnessed it. I put in the date and time, which was 9/22/88 at 0117 hours, and the

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exact location, which was the captain's office in CID Headquarters,
Okay. Now, at what time was the advisement of rights completed?
A The advisement of rights was completed, he read that at 0117 hours, and the advisement of rights was completed a couple minutes after that. Didn't take long to read it through.
Q And did you or Detective McDonald or anybody else in your presence at any time threaten the defendant in any way to get him to make a statement?
A No, we did not.
Q Did either of you coerce him in any way?
A No, we did not.
Q Did you use any threats against him or hold out any promises in order to get a statement from him?
A No, we did not.
Q And did he make a statement?
A Yes, he did.
MR. SCHLAICH: Objection.
THE COURT: Overruled.
A Yes, he did, but he asked that I write the statement for him. And the first line of the

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statement indicated that "I, Kevin Wiggins request that this statement be written for me by Detective W.M. Crabbs. Number 1979, and put an X with a circle and asked him to initial it, which he did.

Q Okay. How many pages was the statement that he made?
A The statement began on page one and was concluded on page nine.
Q And is State's Exhibit Number 41 a true and accurate -- it's a carbon copy of that statement, is it not?
A That's correct.
Q Does it appear to you to be in substantially the same condition as it was on that evening?
A Yes, it does.
Q I would move at this time, Your Honor, to introduce into evidence as State's Exhibit Number 41 the statement of the defendant, and as State's Exhibit Number 44 the Miranda card. And I would ask that Detective Crabbs be allowed to read the statement to the jury. I've provided copies for them to read along.
MR. SCHLAICH: Objection to State's 41, Your Honor.

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THE COURT: Overruled
(State's Exhibit Nos. 41 and 44, statement of defendant and Miranda card, were entered in evidence.)
BY MS. BROBST:
Q I have a copy for the Court of the exhibit.
A That's okay.
Q Detective, would you please read for the jurors the statement that the defendant gave to you?

A Yes. After the first sentence, which is what I read previously, I started a question and answer type session. I asked him the first question, which was, where did you get the 1980 Chevrolet Chevette, Maryland registration PWA 882 --
MR. SCHLAICH: Your Honor, excuse me. Your Honor, would you grant a continuing objection on anything having to do with the statement?
THE COURT: Yes.
MR. SCHLAICH: Thank you.
BY MS. BROBST:
Q You may proceed.
A Thank you. Start over again with the question. Where did you get the 1980 Chevrolet Chevette, Maryland registration PWA 882, that you

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were riding in this evening? His answer was, at Roy Rogers on Social Security. It was on the lot with the keys in it, and I stood out for a minute and I was thinking about taking it then but I didn't. I want and got something to eat, but when I came out it was still on the side with the keys in it. So looked around and then got in it. I was just driving it around and I told my friend Geraldine that it was a buddy of mine's car and that I was staying in it.
Then he said he went to two job sites. I was just driving around and I got a, found a few things in the car. I found one ring and some letters and papers and beer cans that I threw out.
Next question I asked him was, when did you take the car from Roy Rogers lot? His answer

17 was, Friday, around one in the afternoon.
18 Then asked him, which Friday? His answer
19 was, last Friday.
20 Then asked, did you see anyone around the
21 car? His answer was, no, it was people outside, and
22 that's the reason I stood around for a while before
23 I got in it. Keys was in the ignition big as day.
24 You could see it. Window was cracked down.
25 I then asked him, what do you mean by the

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1 window cracked down and which window? His answer
2 was, it was down. The driver's side.
3 Next question I asked was, describe the
4 ring that you say you found. His answer was, small,
5 14 karat gold ring, I found it on the floor. It's
6 dug up like shags. I found a bunch of letters.
7 Next question was, who were the letters
8 addressed to? His answer was, I didn't read them.
9 just threw them away.
10 Next question I asked was, did the ring
11 you found have any stones? His answer was, yeah, it
12 had a stone. It was the only thing I found was the
13 one ring. And it was on the floor with the trash.
14 I don't know if the ring fell out of a bag or off
15 their hand. I just don't know. It was on the
16 floor.
17 Next question I asked was, what did you do
18 with the ring? His answer was, I lied to Geraldine
19 again about that, too. I told her I was doing
20 something for my friend and I found it under a
21 sofa. He said he didn't know who it was so I took
22 it and had her pawn for me.

23 Next question was, who is this friend?
24 Answer was, I wasn't cleaning. I just lied.
25 Next question was, where did you pawn it?

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1 The answer was, the pawn shop is right Downtown near
2 the movie theater, Samuelson's Boston Loan Office,
3 Incorporated.
4 Next question was, what two job sites did
5 you go to? His answer was, one is out near the
6 apartments by the 7-11 near the subway, cause the
7 guys was by there painting.
8 Next question was, where was the other job
9 site? His answer was, I was trying to go down
10 Russell Street. It was a temporary service.
11 Next question was, did you talk to anybody
12 at the job site and who? His answer was, yes, his
13 name was Joe.
14 Next question was, who did you work for
15 and what was their name? His answer was, Joe, a
16 private contractor. It was just me, him, his
17 brother and his mother. I was just there three days
18 and he told me that it wasn't going to work out.
19 Next question was, do you know his
20 brother's name or his mother's name? His answer was
21 no.
22 Next question was, which apartments did
23 you paint and do you know the address? The answer
24 was, 2051. I put up some sheet rock but I don't
25 know the number.

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Next question was, was 2051 to the rear of the apartment? His answer was, no, it was facing the street and the other place was facing the lot. Next question, did you talk to anybody there? His answer was, no, I just did my work. We were in vacant apartments only. Next question was, which three days did you work? His answer was, just this past Wednesday, Thursday and Friday. The next question was, which floor were the apartments on? His answer, first was, the one from the back was on the third floor. The other one was on the basement. Then I asked him later on if he wanted to change anything in there, and to this question he came back and crossed out third floor and initialed KW in each instance and put "top." The next question was, can you describe the apartment building? The answer was, door was brown with gold numbers, brass numbers. Outside was brick. Next question was, what was Joe doing? His answer was, he was working, and I was told I had, I was had to see the guy for a job. I didn't know if his name was Joe or not. I talked. Next question was, can you describe Joe?

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Answer was, tall, white with black and gray hair, heavyset. I was told to call him and I did that night but the line was busy. Next question was, do you know whose car

it was that you were driving? The answer was, no, all of the people there was no way to know whose it was. Next question was, did you look in the glove box? The answer was, after I drove it away, I stopped on a lot and looked through the car. Next question was, was the registration in the glove box? His answer was, I'm not too sure. Next question is, did you ever see a registration for the car? His answer was, I didn't notice it. Next question is, what type of work do you do? His answer was, painting. Next question was, where was the last Job? Answer was, Woodlawn Apartments, make a right at the fire station and the apartments are on the right. Next question, was the apartment on the top, was it in front or back? His answer was, was in the back. Next question was, do you know what he

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drove, the guy you worked for? His answer was, yeah, a brown truck. Next question is, what time did you work on Wednesday? His answer was, around 8 a.m. to 4 p.m. Next question is, what time did you work on Thursday? The answer was, 8:30 a.m. till 4 p.m. Next question was, what time did you work on Friday? His answer was, till 12 noon. Next question I asked was, why only to 12

11 noon? His answer was, because I was trying to get
12 money to pay Brenda Carter at 1013 Walnut Avenue,
13 telephone number 233-3959 so she would hold my stuff
14 for me, but I never made it there because I went to
15 Roy's to get something to eat and that's when I
16 found the car.
17 Next question was, who did you tell her,
18 the girl, about the cards? His answer was, I told
19 her it was a friend of mine's, not to worry about
20 them, and she signed the name for them. I had four
21 cards, Sears, Penney's, Citgo and Hecht's.
22 Have you ever seen the car before, was the
23 next question. His answer was, I can't say I never
24 seen it before in my life but I saw it at Roy's.
25 Next question was, did you tell her to

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1 sign and her name? His answer is, I Just told her
2 to sign the name on there of my friend.
3 Next question was, what is this friend's
4 name? His answer is, Geraldine Armstrong, 4103
5 Paran Avenue in Randallstown.
6 Next question was, which stores did you go
7 to and use the credit cards? His answer, was
8 Hecht's near Randallstown, Sears, Penney's, Sears
9 and Penney's were the same place, Citgo used at one
10 gas station.
11 Next question was, who presented the cards
12 to the salespeople? The answer was, I did, but she
13 signed the receipt. I asked her to sign my friend's
14 name.
15 The next question was, did she sign all of
16 the receipts? His answer was, yeah, cause I told

17 her my handwriting was bad.
18 Next question was, how did you get to the
19 stores? The answer was, driving in the car.
20 Question, which car? The answer was, the
21 car that I had, the one they got me in.
22 The next question was, where did you get
23 the cards? The answer was, in a bag on the floor in
24 the car. They were in a bag with some other cards
25 and some trash.

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1 The next question was what other cards
2 were in the bag? Answer was, I wasn't paying no
3 mind but it was a lot of them.
4 The next question was, what items did you
5 purchase with the cards? His answer was, the two
6 rings, J.C. Penney, the diamond ring, J.C. Penney,
7 shoes, J.C. Penney, socks, between J.C. Penney and
8 Sears, couple of men's sweaters, and he indicated
9 two, Sears, but I'm not sure, and three pairs of
10 men's pants, Sears, but I'm not sure. I know that I
11 found the credit cards and the ring, the trash that
12 I threw out all was in the car.
13 Next question was, were you in the brown
14 truck on Thursday? The answer was, yeah, I be in
15 the truck all the time because he drives me to the
16 building and drops me off where he wants me to work
17 at.
18 Next question was, how did you get into
19 the apartments to work? His answer was, the guy I
20 worked with would let me in with a key.
21 Next question was, did he ever give you a
22 key to get in by yourself? Hie answer was no.

23 Next question, did you work in the
24 apartment on Friday by yourself? His answer was,
25 yeah, I was working over on the same side as the

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1 office was.
2 Next question was, how about Thursday?
3 His answer was, I worked in the same apartment as
4 Friday but both of the brothers were with me and so
5 was the mother.
6 The next question was, if you obtained the
7 car and the credit cards on Friday, how could you
8 have used the woman's Hecht's credit card on
9 Thursday night? At that time, his answer was, I
10 won't say any more until I talk to my attorney.
11 At that time, questioning was stopped.
12 Q Now, was the defendant booked using
13 routine booking procedures?
14 A Yes, he was.
15 Q And do you have the form that was used
16 at that time with you?
17 A Yes, I do.
18 Q And what did he give as his address when
19 he was booked?
20 A His address that he gave was 1013 Walnut
21 Avenue with a zip code of 21229.
22 THE COURT: Ladies and gentlemen, would
23 you pass those forms down, please?
24 BY MS. BROBST:
25 Q Detective, the statement which you've

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1 just read refers to, I found the car last Friday.
2 If the statement was given on September 22nd, 1988,
3 what would have been the date of the last Friday?
4 A That would have bean the 16th.
5 Q Now, did there come a time when you
6 patted the defendant down?
7 A Yes, there was. Prior to placing him in
8 the cell.
9 Q And I'm going to show you that which has
10 been marked as State's Exhibit Number 31 and ask you
11 whether you can identify it.
12 A Yes. Upon patting the subject down
13 before placing him into the cell, as per proper
14 procedure, located in his left front pants pocket
15 was found this latex rubber style glove.
16 MR. SCHLAICH: Objection.
17 THE COURT: Overruled.
18 Q Could you put that back in the
19 envelope?
20 A Sure.
21 Q And does that appear to you to be in
22 substantially the same condition as it did on the
23 date you recovered it?
24 A With the subject of the one finger cut
25 off, yes.

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1 Q The finger was not cut off at that date?
2 A No. It was intact completely.
3 Q I'll move to introduce that into
4 evidence.

MR. SCHLAICH: What number is that, please?
THE CLERK: 31.
THE COURT: You said objection?
MR. SCHLAICH: 31.
THE CLERK: Yes.
MR. SCHLAICH: I do object, yes.
THE COURT: Overruled.
(State's Exhibit No. 31, glove, was entered in evidence.)
BY MS. BROBST:
Q Now, directing your attention back to State's Exhibit Number 32. Did you go down to Samuelson's Boston Loan Office?
A Yes, I did.
Q What date was that?
A That was on -- pardon me until I get my notes. That was on 10/3/1988 at 20 minutes after one in the evening, responded to Baltimore City Police Department's Pawn Shop Unit, and provided Sergeant Taylor with a copy of all their related

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reports concerning this case in order to recover the ring that was indicated on the Samuelson's Boston Loan Pawn Shop ticket.
Upon doing that, he called down to Samuelson's and explained that we'd be on our way down. We then responded down and presented this pawn shop ticket, at which time we were given a ring by the manager there.
Q And I'd ask you to look at that which has been marked as State's Exhibit Number 37 and ask

you whether you can identify that?
A Yes. This is the envelope that the ring was in when we picked it up, indicating Boston Loan Office Incorporated, and this is the ring that we recovered from down there, what we were given that was pawned using that pawn shop ticket.
Q Does the ring appear to you to be in substantially the same condition as it was on the date when you recovered it from the pawn shop?
A Yes, it does.
Q Thank you. I would move at this time to introduce State's Exhibit Number 37 into evidence. I think it's just been identified. I could be wrong.
(State's Exhibit No. 37, ring, was entered

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in evidence.)

* * * *

[WITNESS: DETECTIVE WILLIAM CRABBS]
BY MS. NETHERCOTT:
Q Good afternoon, Detective. Detective

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Crabbs, you arrived at the crime scene here at about five, five minutes after five?
A Yes, ma'am.
Q On the 17th?
A Yes, ma'am.
Q You were there for some amount of time, isn't that correct?
A Yes, it is.

Q Okay. Can you give us an idea how much
time? Several hours?
A Yes.
Q And you had an opportunity to seize, I
believe, two bottles of medication, is that correct,
that were, I believe they were found in the
bathroom?
A Yes.
Q Can you tell us what those medications
were, please?
A Sure. Located in the medicine cabinet
which was above the sink in the bathroom, there were
two prescription drug bottles contained in the
cabinet, both with the victim's name on them. Both
the labels indicated they were purchased on Woodlawn
Pharmacy on Windsor Mill Road, with a telephone
number of 944-4600.

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The one bottle contained Digoxin, .25
milligrams, and the prescription number was 465201.
Date on the bottle was 10/13/1986. The instructions
were one tablet every morning and Dr. Margolis
issued the prescription. The prescription expired
on 5 of '89 and it had zero refills indicated.
The second bottle had the same label but
the prescription number was 4620898 and it was dated
10/2 of '87. It contained Elavil, 50 milligrams.
The instructions were one at bed time. The
prescription was also issued by Dr. Margolis and
expired on 7 of '89 and indicated six refills.
Q Thank you. Detective, did you accompany
the officials from the Medical Examiner's Office who

arrived to the office of the Chief Medical Examiner
Downtown?
A No, I did not.
Q You did at some point, however, go down
to the Medical Examiner's Office?
A Yes, I did.
Q Correct? Can you tell us what day you
did that?
A That would have been the very next
morning, which would have been Sunday morning.
Q Okay. Would you tell us what day that

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was, what the date was?
A 9/18.
Q Okay. And you, in fact, you actually
observed the autopsy, correct?
A Yes.
Q And that autopsy was performed by Dr.
Korell, is that correct?
A Yes.
Q And it was performed Sunday morning?
A I believe so, yes.
Q Okay. Did anyone assist Dr. Korell with
that autopsy? She performed that alone, didn't she?
A Yes, to the best I remember.
Q And on that date, you also, you provided
Dr. Korell with some items from the scene, correct?
A She provided me with some -- originally,
there was some items that were sent down with the
body and she provided me with some items before I
left.
Q Okay. Specifically, you provided Dr.

21 Korell with the two prescription medications that
22 you just mentioned, correct, the Digoxin and the
23 Elavil?
24 A Yes.
25 Q Now, I note from the photograph marked

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1 State's Exhibit 28-JJ -- perhaps I could see that
2 photograph.
3 Detective Crabbs, I'll show you what's
4 been marked for identification as State's Exhibit
5 28-JJ, ask you if you recognize that?
6 A Yes.
7 Q Okay. There's a number of what appear
8 to be prescription bottles on the kitchen table
9 there, correct?
10 A A few, yes, ma'am.
11 Q Okay. Did you seize those?
12 A I don't remember, to be honest with you.
13 Q Okay. They were provided to the medical
14 examiner, correct?
15 A They were?
16 Q They were not?
17 A They were not? I don't know, to be
18 honest with you.
19 Q You don't have any memory of it, do you?
20 A No, I do not.
21 Q And do you have notes, or at least have
22 memory of submitting the other two, correct?
23 A I remember that there were two going
24 down, yes, ma'am.
25 Q And in fact, the Medical Examiner's

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1 Office tested chemically for the presence of those,
2 the components of the drugs Digoxin and Elavil,
3 correct?
4 A In addition to any drugs.
5 Q Right. Did you take those photographs?
6 A They were taken at my direction by the
7 Crime Lab.
8 Q Okay. Do you recall what time they were
9 taken?
10 A Not really. We were there most of the
11 night. I don't remember exactly what time they were
12 taken.
13 THE COURT: Keep your voice up for us,
14 Detective.
15 A Yes. I'm not sure exactly what time
16 they were taken, We were there most of the night.
17 Q Well, the pictures of Ms. Lacs showing
18 her in that tub were taken prior to the arrival of
19 Dr. Felsenberg, correct?
20 A Yes.
21 Q And the pictures that were taken of her
22 after she had been removed from that tub were taken
23 after that, correct, after Dr. Felsenberg's arrival?
24 A Yes.
25 Q Okay. It's also correct, there's no

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1 window in the bathroom, correct.
2 A That's correct.
3 Q Detective, you had occasion to be in the
4 apartment for several hours. You didn't notice

anything unusual about the temperature, correct? It was just normal room temperature, right?
A Yes.
Q Detective Crabbs, I'm going to show you something that's marked Defendant's Exhibit Three. See it for a second, please.
Detective, I'll show you what's been marked as Defendant's Exhibit Three, ask you to examine the contents of that bag. Would you tell us what that is?
A That's the Ryder rental hat that was located just inside the doorway near the closet with the tag still attached.
Q Okay. And you seized that hat?
A Yes.
Q Okay. Thanks.
Now, Detective, on October 13th, 1988, you went to two scores; the J.C. Penney was one of them, and, I believe, Hecht Company was the other one. You went there with that hat to try and determine if the store sold those type of hats, correct?

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A I went there looking for the hat. I didn't take the hat with me.
Q Okay. What was the result?
A I found neither one of those stores sold that type of hat.
Q Court's indulgence for one moment. Now, you also developed information during the course of investigating this homicide that Mr. Wiggins had been in a Sears store in the Columbia Mall?
A Yes.

Q Okay. And you went on the 24th of October to the Sears store to determine whether the Ryder hat, that is the exhibit I've just shown you, is sold there, correct?
A That's correct.
Q And at all of thoes locations, Penney's, Hecht and Sears, the investigation was negative, correct?
A That's correct.
Q Now, it's also correct on December 8th, you went to the Rockdale Auto Service Center on Liberty Road?
A Yes.
Q And you went there in attempt to find records relating to Mr. Wiggins, right?

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A Yes
Q And that was negative, also, correct?
A That's correct.
Q And you went there in an attempt to see if anyone there would identify that hat, correct?
A That's correct.
Q And no one did, correct?
A That's correct.
Q So the end result was that nobody had seen a hat of that type, correct?
A That's correct.
Q Okay. And also, with regard to a Citgo card, you had occasion to trace the use of the Citgo card during the month of September, correct?
A Yes, I did.
Q And It's true, is it not, that you

17 obtained information that that card had last been
18 used on the 20th of September?
19 A According to my notes, when I contacted
20 Citgo, they advised that the purchase was made on
21 9/16 but that additional information was not
22 available at that time.
23 Q Okay. But was there not also
24 information that you received that it was used on
25 the 20th?

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1 A It's possible. I don't remember.
2 Q Well, could you just check your notes?
3 A Sure.
4 Q See if you can find it. Thanks.
5 Detective, if it would assist you here, I think I've
6 got the slips.
7 A Okay,
8 Q Showing you what's marked as State's
9 Exhibit 46. Open that up.
10 A Yes, thank you. These are the two Citgo
11 credit card slips that were sent to me from Citgo,
12 one being a hard copy, one being a photostatic
13 copy. First date on the one indicates it was
14 9/16/88. And the second date was 9/19/1988.
15 Q Okay. Thank you, Officer.
16 MR. SCHLAICH: Court's indulgence one
17 moment.
18 BY MS. NETHERCOTT:
19 Q Detective Crabbs, when you were in the
20 bathroom, is it correct that the fan was off, right?
21 A That's correct.
22 Q It's also true during the course of the

23 time you spent in the apartment, you seized a number
24 of items, correct, some of which are in this
25 courtroom today?

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1 A Yes.
2 Q But you didn't seize the TV Guide,
3 correct?
4 A No, I did not.

* * * *

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14 BY MS. BROBST: [WITNESS: RICHARD HERSKOVITZ]
15 Q Mr. Herskovitz, are you employed?
16 A Yes.
17 Q How are you employed?
18 A At Samuelson's Boston Loan Office.
19 Q And where's that located?
20 A 426 West Baltimore Street.
21 Q Is that in Baltimore City?
22 A Baltimore, 21201.
23 Q Is it near the Arena?
24 A Two blocks away.
25 Q I would like to show you what which has

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1 been marked as State's Exhibit Number 32 and I'd ask
2 you to look in this envelope and ask you whether you
3 can identity the contents?
4 A It's one of our purchase tickets.
5 Q And what's the date on that purchase
6 ticket?

A September 17th, 1988.
Q And what does that indicate to you about
what transpired?
A That on September 17th, 1988, somebody
came in presenting -- Geraldine Armstrong came in at
5:04 p.m. and pawned a diamond ring for $50.
Q Did you make any notations about the
condition of that ring?
A No. There's a comment on here that the
diamond is loose in the mount.
Q Now, I'm going to show you that which
has been marked as State's Exhibit Number 42 and ask
you whether you can identify that document?
A That's a read-out from our computer for
the purchase.
Q And is this read-out kept in the regular
course of business at Samuelson's Boston Loan?
A Yes, it is.
Q And was this particular one kept in the

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regular course of business?
A Yes, it is.
Q Does that indicate to you anything about
the transaction that occurred on that date?
A The same thing I just said, that on the,
on -- what date was it -- on the 17th, that
Geraldine Armstrong came in and pawned a diamond
ring.
Q What year was that?
A 1988.
Q Now, I'm going to show you that which
has been marked as State's Exhibit Number 37. I

would ask you to open this envelope and tell me
whether you recognize the contents and if so, how?
A Looks like a diamond ring. I have to
check the number to see if it was the one that was
pawned.
THE COURT: Sir, you're talking down.
Talk into the mike so the jurors can hear you.
A It looks like a diamond ring. When we
pawn a diamond ring, we'll inscribe a number inside
the shank. The shank is the metal part that's
around the back that corresponds to the ticket
number. If you want to hold on a second, I'll check
to make sure it's the number that's on the ticket.

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Q Thank you.
A The number E-13995 is inscribed inside
the ring. That was the ring that Geraldine
Armstrong pawned that day.
Q Thank you, sir. I would move to
introduce into evidence at this time State's Exhibit
Number 42. Your witness.
(State's Exhibit No. 42, computer
read-out, was entered in evidence.)

* * * *

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[WITNESS SERGEANT DENNIS O'NEILL]
BY MS. BROBST:
Q Sergeant O'Neill, how long have you been
assigned to the First Precinct of the Baltimore
County Police Department?

10 A Since December of '88.
11 Q December of '88?
12 A That's correct.
13 Q I would like now to direct your
14 attention back in time to September 21st, 1988.
15 What was your assignment at that time?
16 A I was a supervisor in charge of
17 selective enforcement at Woodlawn precinct.
18 Q And specifically, on that date at
19 approximately 10:45 p.m., do you recall your
20 location?
21 A Yes, I do.
22 Q Where were you?
23 A I was on Windsor Mill Road headed
24 westbound at Lord Baltimore Drive.
25 Q And what had you been doing?

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1 A We were, earlier that evening, we made
2 several arrests concerning narcotics violations.
3 Q You say we. Were you with anyone?
4 A I was with Detective Donald Coburn.
5 Q Were you all in uniform or --
6 A No, we were in an unmarked, non-descript
7 police unit.
8 Q And how were you dressed?
9 A Casual, beards, long hair and things
10 like that.
11 Q Now, did there come a time when you made
12 an unusual observation?
13 A Yes. Approximately 2246 hours, we were
14 westbound on Windsor Mill approaching Lord Baltimore
15 when we observed, when I observed an orange

16 Chevrolet Chevette bearing Maryland tags W,
17 correction, PWA 882.
18 The vehicle was on northbound Lord
19 Baltimore and it turned on to westbound Windsor Mill
20 Road. We were directly behind the vehicle.
21 As soon as I saw the tag number, we
22 immediately recognized that this is a vehicle wanted
23 in connection with a homicide.
24 Q So what did you do?
25 A We immediately called for additional

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1 marked units and stayed close as we could.
2 Incidentally, it was directly in front of the police
3 station.
4 Police unit was pulling out of the
5 station. We activated a blue emergency light, which
6 is provided for unmarked police units and instruct,
7 I instructed the marked unit to pull in front of the
8 orange vehicle.
9 After activating our emergency equipment
10 and my unit and the traffic unit, the operator of
11 the vehicle, seated at the trial table to my right,
12 stopped the vehicle and we exited the vehicle and
13 walked towards it.
14 Q Okay. I assume you had your guns drawn?
15 A That's correct.
16 Q And did you take anybody out of the car?
17 A Yes. I went up to the right-hand side
18 of the passenger side of the car and seated in the
19 passenger side was a black female with a small
20 child.
21 The defendant was seated in the driver's

side, and my partner went up to the left side of the
car and got him out.
Q And did he make any statements at that
time?

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A Right at that moment, he did not. We
held him in that position until additional units
arrived to make sure the area was safe.
As soon as the additional units arrived
there, we got the child out of there as quickly as
possible and then the woman. And I walked around to
the passenger side of the vehicle where the
defendant turned directly to us and said, she didn't
have anything to do with this.
Q Now, I'm going to show you some
photographs, if you wouldn't mind looking at them
for me, please.
I'm showing you that which has been marked
as State's Exhibit Number 1-D and 1-E. And would
you look at these two photographs and tell me
whether you recognize those photographs?
A Yes. This is the orange Chevette
bearing the Maryland tags, which was stopped that
night, operated by the defendant.
Q And does it appear to you to be in
substantially the same condition as it was when you
stopped it?
A Yes.
Q Now showing you State's Exhibit Number
1-B and 1-C. I would ask you to look at these two

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photographs and tell me whether you can identify
them?
A Yes. This is a photograph of the
interior of the vehicle, a close-up with an ignition
key hanging from the ignition on a key ring, and
also a photograph from the passenger side of the
vehicle with the door open to the inside of the
vehicle.
Q And do these photographs as well appear
to you to be in substantially the same condition as
they were on that night?
A Yes.
Q I would move at this time to introduce
into evidence State's Exhibit Numbers 1-B and C.
THE COURT: 1-D and 1-C?
MS. BROBST: B and C.
THE COURT: B and C.
(State's Exhibits 1-B and 1-C,
photographs, were entered in evidence.)
BY MS. BROBST:
Q Was the defendant then taken into the
Woodlawn station?
A He was handcuffed and taken to the
Woodlawn station.
Q And did you call Homicide?

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A Yes we did.
Q At any time when he was in your presence
did he request an attorney?
A I didn't talk to the gentlemen at all.

5 No, he did not.
6 Q Thank you. Your Witness.
7 CROSS EXAMINATION
8 BY MR. SCHLAICH:
9 Q Sergeant O'Neill, you did have occasion
10 to look in the car that you stopped, correct?
11 A Yes.
12 Q And you had an occasion to look into the
13 back seat area as well as the front seat area,
14 correct?
15 A I looked into it, yes.
16 Q Okay. And you recall, do you not, that
17 the back seat floor was filled with trash basically,
18 correct?
19 A I can't remember.

* * * *

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* * * *

3 BY MR. SCHLAICH:
4 Q Sergeant O'Neill, is it correct that
5 both sides of the car were approached by officers
6 with guns drawn when the car was stopped?
7 A Yes.
8 Q That would include, then, the side that
9 the black female was on, correct?
10 A I walked up to that side.

* * * *

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* * * *

7 MS. BROBST: Members of the jury, it has
8 hereby stipulated and agreed by and between the
9 State of Maryland and Kevin Wiggins, the defendant
10 on trial under Criminal Case Number 88-CR-5464, that
11 the following is a true and accurate fact: The 1980

12 Chevrolet Chevette owned by Florence Lacs had a
13 value of over $300, and it is so stipulated. Move
14 to introduce this original into evidence as State's
15 Exhibit Number 34.
16 THE COURT: Pass those back now, please.
17 (State's Exhibit No. 34, stipulation, was
18 entered in evidence.)
19 MS. BROBST: Your Honor, if it please the
20 Court, we have also entered into a stipulation which
21 is marked State's Exhibit Number 43. Copies for
22 defense counsel.
23 As to State's Exhibit Number 43, members
24 of the jury, it is hereby stipulated and agreed by
25 and between the State of Maryland and Kevin Wiggins,

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1 the defendant on trial under Criminal Case Number
2 88-CR-5464, that Agent Roger Martz of the Federal
3 Bureau of Investigation, a qualified chemist, ran a
4 series of tests on evidence submitted and the
5 following are the results of those tests.
6 An examination was conducted of the water
7 taken from the tub where Florence Lacs' body was
8 found. That examination revealed that propoxur, the
9 active ingredient of Black Flag, was found in the
10 water.
11 An examination was conducted on the rubber
12 glove that was found on the defendant's person when
13 he was arrested on September 21, 1988. That
14 examination revealed that no residues consistent
15 with Top Job, Drano, Sunlight or Black Flag were
16 identified on the rubber glove.
17 An examination was conducted on the slip

18 and blouse worn by Florence Lacs when she was found
19 in the tub. That examination revealed that the
20 green stains on the slip and blouse could not be
21 associated with residues consistent with Top Job,
22 Sunlight, Black Flag or Drano.
23 An examination was conducted on the slip
24 and blouse warn by Florence Lacs when she was found
25 in the tub, to the rubber glove that was found on

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1 the defendant's person when he was arrested on
2 September 21, 1988. That examination revealed that
3 the stains on the slip and blouse could not be
4 associated with the rubber glove, and it is so
5 stipulated.
6 THE COURT: If you will pass those back,
7 please.
8 (State's Exhibit No. 43, stipulation, was
9 entered in evidence.)
10 MS. BROBST: Your Honor, we have one final
11 stipulation today which I would ask to have a copy
12 marked as the exhibit which will be States' Exhibit
13 Number 33.
14 Members of the jury, it be hereby
15 stipulated and agreed by and between the State of
16 Maryland and Kevin Wiggins, the defendant on trial
17 under Criminal Case Number 88-CR-5464, that the body
18 of Florence Georgiana Lacs, the date of birth,
19 9/26/11, the person mentioned in Baltimore County
20 Indictment Number 88-CR-5464, is the same body of a
21 white female, age 76, height 5'7" inches, weight 143
22 pounds, found at 1951, that's a typo, it should be
23 1951-C, Woodlawn Drive in Baltimore County,

24 Maryland, and that the said Florence Georgiana Lacs
25 was pronounced dead at that location by Dr. Stanley

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1 Felsenberg at approximately 9 p.m. on September
2 17th, 1988 and then taken to the Office of the Chief
3 Medical Examiner, State of Maryland, where an
4 autopsy was performed on said body by Margarita
5 Korell, M.D., Assistant Medical Examiner of the
6 State of Maryland on September 18, 1988 at 9 a.m.,
7 and it is so stipulated,
8 (State's Exhibit No. 33, stipulation, was
9 entered in evidence.)
10 THE COURT: Would you pass those along,
11 please?
12 MS. BROBST: Your Honor, I would at this
13 time move to amend that address to 1951-C on the
14 original, which has been marked as State's Exhibit
15 Number 33.
16 THE COURT: Any objection?
17 MR. SCHLAICH: No problem.

* * * *

STATE OF MARYLAND
vs.
KEVIN WIGGINS

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY
CASE NO. 88 CR 5464

STIPULATION

It is hereby stipulated and agreed by and between the State of Maryland and Kevin Wiggins, the Defendant on trial under criminal case 88 CR 5464, that the following are the true and accurate facts:

1. That the Defendant was in possession of Florence Lacs' Hecht's credit card, account #515436664 on September 15 and 16, 1988, without Florence Lacs' permission;

2. That on September 15, 1988, Thursday, the Defendant, along with Geraldine Armstrong, purchased the following items from the Hecht's Company Department Store, located at Security Square Mall. Payment for these items was made by using Florence Lacs' Hecht's credit card without her permission:

a. At 8:57 p.m., form the Fine Jewelry Department - one Herring Bone chain; value $328.13 Exhibit # 4

b. At 9:14 p.m., from the Ladies Sportwear Department - three articles of clothing; value $153.28 Exhibit # 5

c. At 9:19 p.m., from the Fashion Watches Department - one Swatch watch, value $36.75 Exhibit # 6

3. That on September 16, 1988, Friday, the Defendant along with Geraldine Armstrong purchased the following items from the Hecht's Company Department Store located at Security Square Mall. Payment for these items was made by using Florence Lacs' Hecht's credit card without her permission:

a. At 3:51 p.m., from the Mens Department - two articles of clothing, value $74.93 Exhibit # 7

4. That the purchase of Naturalizer shoes, value $40.95 on August 21, 1988 at the Hecht's Company Department Store was made by Florence Lacs, and the payment on the Hecht's charge account on September 29, 1988 was made on Florence Lacs' behalf by her nephew-in-law, Charles Stauffer: Exhibit # 8 and 9.

5. That there had been no other activity on Florence Lacs' Hecht's Company credit card between August 21, 1988 and September 15, 1988;

6. That the Defendant was in possession of Florence Lacs' J.C. Penney's credit card, account # 0146339734 on September 15 and 16, 1988 without Florence Lacs' permission;

7. That on September 16, 1988, Friday, the Defendant, along with Geraldine Armstrong, purchased the following items from J.C. Penney's, located at Security Square Mall. Payment for these items was made by using Florence Lacs' J.C. Penney's credit card without her permission:

a. From the Fine Jewelry Department - one ring; 14k Gold with a dark blue sapphire

stone, surrounded on one side with diamond chips, value $468.59 Exhibit # 10

i) This ring was recovered from Defendant's person when he was arrested on September 21, 1988 Exhibit # 11

b. From the Fine Jewelry Department - one ring; 10k Gold with a gray/white cat's eye stone, value $367.50 Exhibit # 12

i) This ring was recovered from Defendant's person when he was arrested on September 21, 1988 Exhibit # 13

c. From the Fine Jewelry Department - one ring; ladies diamond chip cluster ring, value $114.19 Exhibit # 14

d. From the Women's Department - three articles of clothing, value $130.20 Exhibit # 15

e. From the Infant Department - infant furniture and clothes, value $64.83 Exhibit # 16

8. That on September 16, 1988, Jeanetta Washington was the salesperson at the J.C. Penney's Fine Jewelry Department. Ms. Washington requested that the Defendant complete a client card. The Defendant provided false information with the name and address of Kevin Jackson of 4552 Finney Avenue. The Defendant also provided a false address of 1951 Walnut Avenue for a diamond certificate. Exhibit # 17 and 18.

9. Jeanetta Washington's J.C. Penney's business card was found in the Defendant's wallet when he was arrested on September 21, 1988. Exhibit # 19

10. That there had been no other activity on Florence Lacs' J.C. Penney's credit card between August 1988 and September 16, 1988.

11. That the Defendant was in possession of Florence Lacs' Sears credit card, account # 5485648590394 on September 16, 1988, without Florence Lacs' permission.

12. That on September 16, 1988, Friday, the Defendant, along with Geraldine Armstrong, purchased the following items from the Sears Department Store, located at the Columbia Mall. Payment for these items was made by using Florence Lacs' Sears credit card without her permission:

a. Casual shoes value $49.34 Exhibit # 20

b. Jeans value $20.99 Exhibit # 21

c. Three articles of clothing value $53.52 Exhibit # 22

d. 14k Gold chain 7" value $31.49 Exhibit # 23

e. 14k Gold chain value $83.99 Exhibit # 24

f. Two travel bags value $46.18 Exhibit # 25

g. Infants 2-piece set value $11.54 Exhibit # 26

13. That there had been no other activity on Florence Lacs'

Sears credit card between August 1988 and September 16, 1988.

14. That there was no activity on Florence Lacs' Hecht's, J.C. Penney's or Sears credit card after September 16, 1988.

15. That Joan Murley, Document Examiner for Baltimore County Police Department examined all of the signatures on all sixteen sales receipts from Hecht's, Penney's, and Sears and stated in her expert conclusion that Geraldine Armstrong prepared the "Florence G. Lacs" signatures on all of the sales receipts.

16. That, Det. Tim Ostendarp, Fingerprint Examiner for Baltimore County Police Department, conducted comparison examination of a Latent fingerprint found on the front of a Sears sales receipt (Total $53.52) and found the characteristics to be identical to inked fingerprints of Geraldine Armstrong.

/s/ Kevin Wiggins	/s/ S. Ann Brobst
KEVIN WIGGINS	S. ANN BROBST
Defendant	Assistant State's Attorney
/s/ Carl Schlaich	/s/ Robin S. Coffin
CARL SCHLAICH	ROBIN S. COFFIN
Assistant Public Defender	Assistant State's Attorney
/s/ Michelle Nethercott	Aug. 1, 1989
MICHELLE NETHERCOTT	DATE
Assistant Public Defender	

In the Circuit Court for Baltimore County

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins

Reporter's Official Transcript of Proceedings
Monday, October 16, 1989
Towson, Maryland

Before:
Honorable J. William Hinkel, Judge and a Jury

* * * *

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* * * *

[WITNESS: DR. MARGARITA KORELL]
20 BY MS. BROBST:
21 Q Dr. Korell, how long have you been
22 employed with the Office of the Chief Medical
23 Examiner in Baltimore?
24 A I've been an assistant since October,
25 1978, and before that I was two years as an

Page 4

1 associate pathologist, a training-type job at the
2 same place.
3 Q Can you describe for the members of the
4 jury your educational background?
5 A I became a physician at the University
6 of Buenos Aires, Argentina. And I did a
7 rotating-type internship at Fordham Hospital in the
8 Bronx, New York. Then I had training in

hospital-type pathology, that's anatomical and clinical pathology, at Fordham and Misericordia M-I-S-E-R-I-C-O-R-D-I-A, Hospital, also the Bronx, New York.
Then I decided to go into forensic pathology and for one year I went to the Coroner's Office in Pittsburgh, Pennsylvania for training.
And then I came to Baltimore.
Q Are you board certified in the field?
A No, ma'am.
Q And are you a member of any organizations dealing with your speciality?
A With path -- no. In medicine generally, the American Medical Association, and I'm licensed to practice medicine in this state.
Q And what degrees do you have?
A M.D.

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A medical Doctor Degree?
A Yes, sir. Yes, ma'am.
Q Now, what do you do down at the Medical Examiner's Office? What are your duties?
A My duties are to determine the cause of death in people who have died suddenly, unexpectedly, violently, like in a homicide, suicide accident, or in people who have died suddenly while not under the care of a physician. Now, this is done by doing an external examination of the body to determine if there are any wounds and if there are any, where they are located. Then through an internal examination we determine the extent of any wounds or diseases inside the body.

At that time, also, we retrieve, we could retrieve evidence like in the gunshot wound, maybe a bullet. Also, we retrieve body fluids for toxicological analysis. All this compiled, then, in an autopsy report.
Q How many autopsies could you estimate have you performed?
A I think over 3,000.
Q And have you ever qualified to testify as an expert in forensic pathology in any courts?
A Yes, ma'am.

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Q And what courts are those?
A I have been called to almost every court in every county in this state, in Federal Court in Baltimore, and Washington, and Danville, Illinois, and called in Orlando, Florida, and also Federal Court in Brooklyn, New York.
Q And how many times have you testified in court as an expert in forensic pathology, if you know?
A By now it's over 150 or so times.
Q Have you ever qualified in Baltimore County Circuit Court?
A Oh, yes, several times.
Q Your Honor, I would be offering this witness as an expert in the field of forensic pathology.
MR. SCHLAICH: No objection.
THE COURT: I'll accept her.
BY MS. BROBST:
Q Doctor, I'm going to show you that which

has been marked as State's Exhibit Number 36. Can you look at that and identify it for the members of the jury?
A Yes. This is a notarized copy of the autopsy on Florence Lacs. The autopsy number is

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882398.
Q Did you perform that autopsy, Doctor?
A Yes, ma'am.
Q And what date did you perform that autopsy?
A That was done on September 18th, 1988.
Q And can you tell us what you did in this case when you received the body of Florence Lacs?
A We first photographed her the way she was received in our office. Then we did, I did an external examination of the body. Then an internal examination through a Y-shaped incision. That means going through the chest and abdomen. And then we examined organ by organ and included in it was also examination of the head.
Q And are you familiar with the term "defensive injuries?"
A Yes, ma'am.
Q Did you find any of those when you performed this autopsy?
A I found a contusion on the dorsum of the left hand. It's a bruise. Now, defensive-type injuries, again, are injuries that occur while somebody tries to fend off an oncoming weapon. So that's the only one, the injury that would qualify

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for that.
Q And was that injury consistent with the defensive-type injury?
A It's really only, it's a contusion, a bruise. It doesn't have a pattern to it. It's a wound that could have occurred while she tried to fend off or fight off somebody or something.
Q Now, when you performed her autopsy, did you have occasion to familiarize yourself with the circumstances under which Mrs. Lacs' body was found?
A Yes, ma'am.
Q And did you form an opinion within a reasonable degree of medical certainty as to the cause of her death?
A Yes, ma'am.
Q On what did you base that opinion?
A I based my opinion in that on the way she was found -- again, she was found submerged in water -- and also the circumstances surrounding the way her place looked, and then through an internal examination, mainly the appearance of the lungs. Based on that and the appearance of the heart, also.
Q And using these considerations, keeping these considerations in mind, did you form an opinion within a reasonable degree of medical

Page 9

certainty, as to the cause of death in this case?
A Yea, ma'am.
Q And what was your conclusion?
A My conclusion was that Miss Lacs died of

drowning and with contributory arteriosclerotic cardiovascular disease.
Q What does that mean?
A Arteriosclerotic cardiovascular disease, essentially in lay terms, means hardening of the arteries. In this case, the coronary arteries, the arteries that supply blood to the heart, were very much hardened and they only had, two of them had only pinpoint lumen where the blood could go through it.
Q And did you form an opinion within a reasonable degree of medical certainty as to the manner of death in this case?
A Yes, ma'am.
Q And what was your conclusion with respect to the manner of death?
A Based on the way she was found submerged in the bath tub and the appearance of the surrounding area, and based on the autopsy, the manner of death, my opinion was homicide.
Q Now, could you please explain to the

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members of the jury how one goes about trying to ascertain a time of death?
A Well, the time of death is, we check for the time of death. We check the rigor mortis, R-I-G-O-R, M-O-R-T-I-S. That's the stiffening that occurs after death.
There are certain chemical changes in the muscles that make the joints and every body part stiffen. Now, to be complete, it takes several, it starts right away but it takes several hours to

settle completely.
Another parameter is the livor mortis, L-I-V-O-R, M-O-R-T-I-S. That's the settling of the blood after death on the dependent parts of the body.
Now, settling of the blood is that the blood settles in the blood vessels under the skin. That starts right away. It takes several hours to show up. And at one point, at the beginning, livor mortis is not mixed. That means when pressure is applied at the site where there is bluish discoloration, settling of the blood, the area blanches. After several hours, no matter how much one presses on the skin, the skin stays still blue because the blood has settled completely in the

Page 11

blood vessels and also broken up small blood vessels and gone into the skin. So all this takes several hours.
Of course, if the body is relatively fresh, there is also the temperature of the body to be considered. That's very valuable. Now, for all these things, rigor mortis, temperature, livor mortis, all these processes take several hours. They are very valuable.
I mean, what happened before, I mean, the activity at this time of the person, of the victim before he or she died, the ambient temperature, if there are any currents of air in the place where the person was found, all these are several valuables to consider in the time of death of somebody. And again, where the person was found, if in water or

17 outside in the dry area.
18 Q Okay. So are there specific
19 considerations that are attendant to a drowning
20 situation?
21 A Yes.
22 Q Okay. And what would that be?
23 A Well, drowning, first of all, that
24 somebody is submerged in water, including the whole
25 face or part of the face. Then at autopsy, a

Page 12

1 consideration is the boggy appearance of the lungs,
2 B-O-G-G-Y. That's very wet, soggy lungs that by
3 autopsy almost appear to stand by themselves. There
4 are really no specific things to find in a drowning;
5 mainly is the circumstances.
6 Q And are there any other reasons why
7 one's lungs may be boggy in appearance?
8 A You can get wet lungs in people who have
9 died or in heart failure, people who have had head
10 injuries or any other injuries. Pulmonary edema,
11 that means wet lungs. It's also rather
12 non-specific.
13 Now, in drowning, the lungs appear a
14 little bit more soggy and they sort of stand by
15 themselves, something that you wouldn't generally
16 see in people who died with pulmonary edema due to
17 other causes. But again, that's not 100%.
18 Q How about the lungs in this case, the
19 lungs of Mrs. Lacs?
20 A The lungs of Mrs. Lacs, they had that
21 typical boggy appearance.
22 Q Typical of what?

23 A Drowning.
24 Q Now, in the case of Mrs. Lacs, was it
25 possible to pinpoint a time of death?

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1 A Well, time of death never can be
2 pinpointed unless somebody dies right in front of
3 somebody else. Again, she was found in water. In
4 my opinion, it was cold water. So there are -- and
5 based on that, somebody in cold water is better
6 preserved, you know, based on that the water is
7 cold. In my opinion, it was cold because she did
8 not look like she was scalded in any way.
9 Based on that, and at the time she was
10 found she was still stiff, according to the County
11 Medical Examiner who first saw her. So in my
12 opinion, that that could have occurred --
13 MR. SCHLAICH: Objection.
14 THE COURT: Sustained. Wait for another
15 question, please.
16 BY MS. BROBST:
17 Q Did you form an opinion within a
18 reasonable degree of medical certainty, based on the
19 investigation you did of this case, as to a range of
20 the time of death?
21 A Yeah. Based on all the things I said
22 before, I estimated that Miss Lacs could have died
23 24 or 48 hours before she was found.
24 Q Okay. Now, are you familiar with the
25 term, epidermal slippage or skin slippage?

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A Skin slippage, yes.
Q Okay. Did you find any of that in this case?
A No, ma'am.
Q What is skin slippage?
A Skin slippage is, in general, is noted in people who are decomposing and the upper layers of the skin become detached from the rest. And a very, I mean, a very drastic example is that the whole, the entire skin of the hand, for example, can slip off like a glove. That's skin slippage.
Q And you refer to the fact that you found no evidence of scalding. Could you describe under what circumstances you would find evidence of that?
A We can find evidence of scalding, that's immersion in hot water -- that's the definition, more or less -- when somebody is immersed in hot water.
Q If I could have the Court's indulgence for one minute.
Can you please tell the members of the jury how much it takes livor to become fixed?
A Again, livor becomes fixed, considering an ambient temperature of 70 degrees or so, without

Page 15

being in water, and again, it takes several hours. It can be from eight to twelve.
Q Thank you, Doctor. I have no further questions. Your witness.

CROSS EXAMINATION
BY MR. SCHLAICH:
Q Court's indulgence, please, Your Honor.
Dr. Korell, Mrs. Lacs suffered from severe heart disease, correct?
A Yes, sir.
Q And you were aware that she had Digoxin prescribed for that?
A I don't remember if she was --
Q Do you remember if the homicide detective brought you the bottles to show you?
A Yeah. I don't recall about Digoxin.
Q You did a screening for those types of medications that would have shown if it was in her system, correct?
A Digoxin, you have to ask for a separate test for that.
Q I see. So the work you did in this autopsy would not have revealed whether it was present or not?
A Not really.

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Q Now, Miss Lacs weighed how much.
A 143 pounds.
Q And could you tell us, please, in your opinion, what you would expect the normal weight of the lungs to be in an adult female of 143 pounds?
A Normally, between 300 and 350 or so, each.
Q Each?
A Yeah.
Q Now, you found Miss Lacs' right lung to

11 weigh 480 and her left 450, correct?
12 A Yeah.
13 Q In fact, those numbers are not that
14 severely high for a drowning case, are they?
15 A It's more the appearance. The lungs
16 look wet and when you press them you get foamy fluid
17 squishing out. Also, they have, they are soggy, and
18 since they can sort of stand up by themselves, they
19 seem like they are hyperaerated. So they don't need
20 to be astronomically high in weight. Appearance
21 more than anything else.
22 Q Let me go back to what I was asking.
23 Those weights are not extremely high for --
24 A Extremely high, no.
25 Q In fact, it would not be unusual in a

Page 17

1 known drowning case, say where a body was pulled out
2 of the Bay or something, for the lung to weigh
3 almost twice the norm you just gave us, right?
4 A Let me recall some of the drownings.
5 Yes, they can be higher. They can be the same
6 level. More than anything else, it's the appearance
7 of them.
8 Q You would agree, though, that the
9 appearance of the lungs in Miss Lacs' case could be
10 or actually is something you would see in a case of
11 a person who had died of severe heart disease,
12 correct?
13 A If she hadn't been found the way she was
14 found, yes.
15 Q Okay. If she had not been found
16 submerged, had been found on the floor, and you look

17 at her lungs, you would have said she died of heart
18 disease?
19 A On the other hand, like I said, these
20 lungs were more, were consistent with, more
21 consistent with drowning because of the way, that
22 boggy appearance that you really may not see in any
23 other condition. They sort of stand up by
24 themselves. Again, it's not 100% specific.
25 Q Okay. Well, the reason I'm asking about

Page 18

1 the heart disease possibility is because heart
2 disease causes pulmonary edema as you said, correct?
3 A Certainly.
4 Q Pulmonary edema means your lungs fill up
5 with fluid?
6 A Yes.
7 Q Other parts of your body do, too, like
8 your legs?
9 A Legs, yes.
10 Q In fact, in Miss Lacs' case, you found
11 the edema in her legs, right?
12 A Yeah. Pitting edema.
13 Q Court's indulgence. Doctor, you talked
14 about the fact that this water was cold because you
15 found no scalding, is that right?
16 A Yes, sir.
17 Q Okay. Now, you're talking about the
18 reddening or even blisters you would get if you
19 were, if you had your hand stuck in hot water?
20 A Yes.
21 Q What temperature of water does it take
22 to cause that scalding?

23 A Scalding, very hot type water, yes.
24 Q We're talking 130 degrees or so, right?
25 A 130, yes.

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1 Q So when you say cold water, water of
2 maybe 100 degrees you would consider cold?
3 A No. I still consider that rather warm.
4 Q Okay. But it wouldn't scald the body?
5 A But it still would accelerate the
6 decomposition, and still 100 degrees is warm.
7 Q Okay. So what --
8 A Anything that's less than lukewarm, I
9 would call cold.
10 Q Okay. Could you give us a temperature
11 for what you would call cold?
12 A Cold, less than lukewarm.
13 Q Room temperature water, room temperature
14 -- I'm sorry. You use the term "ambient
15 temperature", is that right?
16 A Yes.
17 Q That is sort of equated with inside, to
18 the room temperature, right?
19 A Well, I mean temperature, you know, to
20 establish how many hours you get rigor mortis, livor
21 mortis. These standards are for 70 degrees in air.
22 Q By standard, you mean if you opened the
23 textbook and it said rigor starts here and ends
24 here, that would be at 70 degrees, right?
25 A Yeah. Yeah. But in air.

Page 20

1 Q Okay.
2 A Temperature.
3 Q Now, you said that you had reviewed the
4 notes of the County Medical Examiner, is that
5 correct?
6 A Yes, sir. The County Medical Examiner
7 sent in. That's regularly done with every deputy.
8 He sends in with a body an investigation report,
9 whatever he has available at the time he's involved
10 with the case.
11 Q And you read his report?
12 A Yeah.
13 Q And you are aware from his report that
14 when he saw the body at approximately 9 p.m. on
15 Saturday, the body was half in the water and half
16 out of the water, is that right?
17 A Here it says half submerged in water,
18 yes.
19 Q Okay. And Dr. Felsenberg, in his
20 report, does not make any note of any extremes in
21 either the temperature of that water or the
22 temperature of the air, correct?
23 A No, he doesn't mention anything about
24 it.
25 Q Okay. And if the person was to do good

Page 21

1 on-site medical examiner work, if there were an
2 extreme in temperature, that would be something you
3 would put down, right?
4 A Yes.

Q Now, you've given here today an estimate
of the range of Miss Lacs' time of death of 24 to 48
hours, is that correct?
A Yes, sir.
Q And what time are you dating that back
from? When she was found by the paramedics?
A When she was found by, based on what Dr.
Felsenberg saw, rigor, at the time he saw the body.
That was on the 17th.
Q Okay.
A Late in the evening.
Q So you are saying 24 to 48 hours before
9 p.m. on Saturday?
A Right.
Q So going back, now, from 9 p.m. on
Saturday, you would say that Miss Lacs died some
time after 9 p.m. on Thursday and sometime before 9
p.m. on Friday, correct?
A What day was the 17th?
Q Okay. Saturday was the 17th. So 48
hours back, would you agree, would be 9 p.m., the

Page 22

15th?
A Right.
Q Okay. So sometime after?
A Approximately, yeah.
Q Sometime after 9 p.m. on Thursday and
ending at 9 p.m. on Friday is the range you're
giving, is that correct?
A Yes.
Q Doctor, when you do an autopsy and are
trying to establish a time of death, isn't it

correct that it would be important to you to know
when, to know of reports of when the person had last
been seen alive?
A Certainly.
Q Okay. The homicide detectives in this
case did not tell you that anybody had seen Miss
Lacs alive or had talked to her alive on Friday, the
16th, correct?
A I don't recall. I don't remember that
part.
Q If you were told that someone says they
talked to her at approximately 10 to 10:30 on Friday
morning, 10:30 a.m., that would be consistent with
the range of time you've given us for her death,
correct?

Page 23

A 10:30 in the morning.
Q Friday.
A Friday. She's found 9 p.m. Saturday.
That's between, yeah.
Q That's between?
A The 24 and 48 hours, yeah.
Q Court's indulgence.
Could I have this marked as defense
exhibit, please?
THE CLERK: That's 4.
Q Doctor, let me direct your attention to
this document that's now been marked as Defendant's
Exhibit 4. Do you recognize that?
A Yes.
Q What is that?
A It's a death certificate, copy of a

17 death certificate.
18 Q Of?
19 A Florence Lacs.
20 Q And that's your signature at the bottom?
21 A Yes, ma'am -- sir.
22 Q And when did you sign that?
23 A That was signed at, first the case was
24 left pending. So I signed it at that time without
25 anything on the certificate, cause and manner of

Page 24

1 death.
2 Q Okay. When did you do that? When did
3 you?
4 A I signed it the day I did the autopsy.
5 Q Which would be the 18th of September,
6 1988.
7 A Yes. And then the cause and manner of
8 death was filled in later after we sent a letter to
9 the Health Department.
10 Q Okay. In fact, you made notations of
11 the fact that some things were filled in later up on
12 the top, and dated December the 6th, is that
13 correct.
14 A Yes. I think the Health Department does
15 that after they receive our pending letter.
16 Q Oh, I see. And one of the things you
17 left pending in September when you did the autopsy
18 was the cause of death, correct?
19 A Yes, sir.
20 Q Okay. Now, let me ask you something
21 else. You have down here that, when you did fill it
22 in sometime later, you said the cause of death was

23 drowning?
24 A Yeah.
25 Q The contributing cause was

Page 25

1 arteriosclerotic cardiovascular disease. What does
2 "contributing cause" mean?
3 A That it was significant enough to be put
4 on the death certificate as part of the death
5 certificate.
6 Q Okay. So it's significant enough that
7 it could be an alternate diagnosis? Is that why
8 it's significant?
9 A Alternate? I don't know what you mean.
10 Q Well, you put it on there because it
11 could be 50% that she drowned or 50% that she died
12 from heart disease, is that right?
13 A No. Contributing to death, it doesn't
14 mean, it doesn't give a percentage as such. It's
15 there. It's very significant and we put it on the
16 death certificate because that's what she had.
17 Q Okay. In your autopsy, you used the
18 term "underlying." Is that the same as
19 contributing or is that different?
20 A Underlying? Again, here I said died of
21 drowning with contributory arteriosclerotic
22 cardiovascular disease. Again, yeah, in the
23 opinion, it says she had severe coronary artery
24 disease, hardening of the --
25 THE COURT: Slow down, Doctor.

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A Sorry. She had severe coronary artery disease, brackets, hardening of the arteries, which combined with the stress of the situation contributed to her death. I don't see the word "underlying" here.
Q Okay. I made a mistake. Actually, underlying's checked on the death certificate. What does that mean? It says external cause was underlying.
A It should have been put in this second.
Q Should have been contributing?
THE COURT: Doctor, speak into the mike so the jury can hear you.
A Yes. On the death certificate, in a little part called 21-A, it says "external cause was." There are two brackets, underlying or contributing cause of death. It should have been -- there is an X on underlying, but it should have been put on contributing.
Q Just a typo, then?
A I think, yes.
Q Okay. One other thing. Item 2-A up in the right-hand corner is not, is one of the things you filled in on September the 18th when you did the autopsy, correct?

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A Usually, if a case is pending, we shouldn't put it because it's pending. Also, that part, I don't remember when that was put in.
Q Okay. When the other things are filled

in note does not indicate 2-A in the list as having been filled in later, correct?
A Yeah. It says Part 2 only. 18-A, Part 2 and 21-A, yes.
Q Okay. But not item 2-A in the first part?
A And this, again, is filled in by the Health Department.
Q So at some point during this procedure, you marked that Item 2-A, estimated time of death of 9/16/88, correct?
A Right. I'm sorry.
Q That's okay. I would move to introduce this into evidence as Defense Exhibit 4.
MS. BROBST: No objection.
(Defendant's Exhibit No. 4, death certificate, was entered in evidence.)
MR. SCHLAICH: No further questions, Your Honor.
RE-DIRECT EXAMINATION
BY MS. BROBST:

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Q You testified on cross as to certain lung weights and you said 450, 480, but you never said what.
A Grams. I'm sorry.
Q Grams. Okay. And you also testified that there's a difference between bodies found in air and bodies found in water?
A Certainly.
Q Can you tell the members of the jury what effect water has on a deceased?

11 A Again, it depends on the temperature of
12 the water. If the water is cold, the body stays
13 better preserved. The rigor mortis, livor mortis,
14 all that is extended as long as the body is in cool
15 or cold water.
16 So we see people who have drowned in
17 rivers or in oceans. They stay quite well preserved
18 for quite a while, until they come out of the air,
19 then they decompose fast.
20 So essentially cold water preserves the
21 body better.
22 Q And by cool or cold, you mean anything
23 cooler than lukewarm?
24 A Yes.
25 Q Now, you stated that it is your opinion

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1 that Mrs. Lacs had been deceased for 24 to 48 hours
2 prior to her having been found, is that correct?
3 A Yes, ma'am.
4 Q If livor and rigor were actually set at
5 4:00 in the afternoon on the 17th, is that the time
6 from which your estimate would run?
7 MR. SCHLAICH: Objection.
8 THE COURT: Overruled. Do you have an
9 opinion with respect to that?
10 A Yes. If rigor and livor, if somebody
11 can -- I only go by what Dr. Felsenberg saw at 9. I
12 don't know if somebody saw her already stiff at 4
13 and with livor at 4. Yes, then you could count
14 backwards like that, yes.
15 Q Okay. And when you refer to livor, are
16 you referring to a settling of the blood in the part

17 of the body which is down?
18 A Yes.
19 Q Now, when you performed your autopsy at
20 the Medical Examiner's Office, did you notice where
21 livor was present?
22 A Yes.
23 Q And where was it?
24 A It was, I have in here written as
25 lividity, livor was present and fixed on the right

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1 posterior surface of the body except in areas
2 exposed to pressure. That's essentially the back
3 and right side of the back.
4 Q Okay. Your Honor, at this time I would
5 move to introduce into evidence the autopsy report
6 referred to during testimony.
7 MR. SCHLAICH: I have one objection. May
8 we approach the bench, please?
9 THE COURT: Yes.
10 (Counsel and defendant approached the
11 bench and the following ensued:)
12 MR. SCHLAICH: The doctor last testified
13 very specifically today that there was only one
14 defensive-type injury and in here she states that
15 there were two, one being a small hemorrhage in the
16 neck. That was testified about extensively during
17 the trial phase. I would ask that that hemorrhage
18 part be stricken out of here before it's
19 introduced.
20 MS. BROBST: This is the true autopsy
21 report, she said, when asked on direct, she didn't
22 recall but the one. That doesn't make the official

23 autopsy report inadmissible, because she didn't
24 testify, she wasn't specifically questioned.
25 Refreshes her recollection. I don't think that

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1 makes it inadmissible, colors her testimony.
2 MR. SCHLAICH: Well, it's an opinion of
3 the expert that I can't cross examine her about
4 unless I bring it out. And I don't see a reason why
5 the defense should bring out something that could be
6 construed more damaging, to be damaging. If she
7 hasn't testified to it on the State's questions,
8 then that shouldn't be slipped in in a back door
9 method.
10 THE COURT: That's not slipping it in a
11 back door method. Overruled.
12 (Counsel and defendant returned to trial
13 tables.)
14 THE COURT: State's Exhibit 36.
15 (State's Exhibit No. 36, autopsy report,
16 was entered in evidence.)
17 MS. BROBST: I have nothing further.
18 THE COURT: Anything else further, Mr.
19 Schlaich?
20 RE-CROSS EXAMINATION
21 BY MR. SCHLAICH:
22 Q Dr. Korell, the State's Attorney asked
23 you a theoretical question about what if you knew
24 things about when Miss Lacs was actually found at
25 4:00.

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1 A Yes.
2 Q You don't know anything about what she
3 was like when she was found at 4:00, correct?
4 A No, not really.
5 Q Okay. Now, one of the things you've
6 based your time range on is that Dr. Felsenberg
7 found rigor to be present at 9 p.m., correct?
8 A Yes, sir.
9 Q Okay. If you knew that rigor was
10 present at 4 p.m., in fact, that would shorten your
11 range of time of death rather than lengthen it,
12 correct, because rigor peaks at a certain point in
13 time so that if she's found stiff at 4:00, that may,
14 in fact, be the peak?
15 A But then she was, if I may say, she was
16 found stiff at 9, also. Everything is a range of
17 several hours. So I mean, I don't, five hours
18 different, yeah.
19 Q Okay. So really, you don't know
20 anything about 4:00? You can't really answer the
21 question, right?
22 A She could still be -- she was very much
23 stiff at 9:00. She could have been stiff at 4,
24 also, yes.

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15 BY MS. BROBST: [WITNESS: DR. ANN DIXON]
16 Dr. Dixon, how are you employed?
17 I'm Deputy Chief Medical Examiner for
18 the State of Maryland.
19 Q I think you may have to move that mike

20 up a little bit. I'm not sure the jury can hear
21 you.
22 THE COURT: Speak as loudly as you can.
23 Would you state that again?
24 A I'm Deputy Chief Medical Examiner for
25 the State of Maryland.

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1 Q And how long have you been so employed?
2 A As Deputy Chief, two and a half years.
3 I've been at the Medical Examiner's Office for
4 almost 15 years.
5 Q And what were your duties before you
6 were Deputy Chief Medical Examiner?
7 A I was an Assistant Medical Examiner.
8 Basically, my duties involved performing post mortem
9 examinations on deceased individuals whose death
10 brought them within the jurisdiction of the medical
11 examiner system.
12 Q Could you describe for the members of
13 the jury your educational background?
14 A I received my medical education at the
15 University of Edinburgh, Scotland. I graduated from
16 that institution in 1966. Thereafter, I spent one
17 year as an intern in general medicine and surgery,
18 and in 1967 I started training in pathology.
19 There are two main branches of pathology.
20 One is anatomic, and that deals with the tissues
21 that are removed during surgery, cytology, and also
22 the performance of post mortem examinations. The
23 other main branch of pathology is clinical
24 pathology, and that involves all of the lab tests
25 that are performed.

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1 I trained in both areas of pathology for
2 three years in Edinburgh. Then in 1970, I came over
3 to this country and continued with my training in
4 the Wake -- excuse me -- the Bowman Gray School of
5 Medicine of the Wake Forest University, which was
6 affiliated with the North Carolina Baptist Hospitals
7 in Winston-Salem, North Carolina.
8 I spent three more years training and I
9 stayed on for an extra year as a lecturer at the
10 medical school, having completed my training.
11 Q And did you specialize at that point?
12 A At that point, I was doing both anatomic
13 and clinical. I took the speciality examinations
14 for board certification in both areas and passed
15 those. And in 1974, I came up to Baltimore and
16 commenced here as an Assistant Medical Examiner.
17 Q What degrees do you hold in your field?
18 A I just have an M.D. The certifications
19 are not degrees as such. I am also certified in
20 forensic pathology, which is what I have been
21 practicing for the past 15 years.
22 Q Are you licensed to practice medicine in
23 Maryland?
24 A Yes, I am.
25 Q Are you a member of any organizations in

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1 the medical field?
2 A No, not really.
3 Q Now, can you estimate for us the number
4 of autopsies that you perform in your duties as

Assistant Medical Examiner and Deputy Medical Examiner?
A Somewhere in the region of 7,000, give or take a few.
Q And have you ever been qualified to testify as an expert in the field of forensic pathology in any court?
A Yes, I have.
Q How many occasions, approximately?
A Approximately 270 occasions.
Q And in what courts?
A Most of the county courts in Maryland. I think there are two that I haven't had to testify in. I've also testified in Washington, D.C. and Wilmington, Delaware.
Q Your Honor, at this point I will be offering Dr. Dixon as an expert in the field of forensic pathology.
MR. SCHLAICH: No objection.
THE COURT: Accepted.
BY MS. BROBST:

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Q Thank you. Dr. Dixon, pursuant to your duties as Deputy Chief Medical Examiner for the State of Maryland, did you have occasion to consult with Dr. Margarita Korell about an autopsy which she performed on September 18th, 1988.
A Yes, I did.
Q And if would you look at that document in front of you, it's been marked as State's Exhibit Number 36. Could you tell me whether you are familiar with that document?

A Yes, I am.
Q And have you reviewed that before today?
A Today?
Q Yes.
A Not today, I haven't reviewed it. I have reviewed it prior to today.
Q On a previous occasion?
A Yes.
Q Okay. Are you familiar with the autopsy report in the case?
A Yes.
Q And based on that report and your experience in the field of forensic pathology, were you able to determine within a reasonable degree of medical certainty what the cause of death was in

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Mrs. Lacs' case?
A Yes.
Q And what did you base your opinion on?
A The opinion was based upon the circumstances under which she was discovered and the general autopsy findings, which basically are non-specific, but there was not a specific, acute anatomic cause of death that one could go to basically. The diagnosis in this case is one, to some extent, by exclusion and also based upon the circumstances and non-specific findings.
Q Okay. And what is your conclusion that you have reached within a reasonable degree of medical certainty as to the cause of Mrs. Lacs' death?
A Mrs. Lacs died as a result of drowning.

17 She also did have hardening of the arteries and this
18 was determined to be a contributing factor in that
19 death.
20 Q Are there any specific -- you say there
21 are non-specific findings. Are there any specific
22 findings which would also cause you to conclude that
23 she died as a result of drowning?
24 A The one finding that is entirely
25 consistent with death due to drowning is the heavy,

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1 wet lungs, which Dr. Korell has described as boggy
2 lungs.
3 Q And that is a specific consistency with
4 drowning?
5 A It is entirely consistent with
6 drowning. In and of itself, it is not
7 pathognomonic. It doesn't say this is the cause of
8 death. But it is entirely consistent with a death
9 by drowning.
10 Q When one is performing an autopsy and
11 attempting to determine a cause of death, are the
12 circumstances under which a body is found
13 traditionally or routinely looked into?
14 A Yes, in our field.
15 Q Right. Now, also, additionally, with
16 reference to your consulting on this case, were you
17 able to ascertain within a reasonable degree of
18 medical certainty a time of death for Mrs. Lacs?
19 A Pinpointing time of death within the
20 ground of reasonable medical certainty is all but
21 impossible. One can determine within realms of
22 probability but not medical certainties.

23 Q And can one determine a range in which
24 someone was actually killed?
25 A Obviously, the broadest range within

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1 which death is noted to have occurred is between the
2 time that an individual is last known alive and when
3 they're found dead. Within that range, one can, by
4 assessing the degree of post mortem changes which
5 have occurred, narrow down that range to something
6 still relatively broad, but one can certainly narrow
7 it down, the range as to time of death.
8 Q All right. You described anatomical
9 changes. What kind of things do you look for?
10 A For the most part, again it depends on,
11 to some extent, how long an individual has probably
12 been dead. In the early phase following death, body
13 temperature can be quite useful. Following that,
14 one also assesses the degree of development of rigor
15 mortis, the stiffening of the muscles which occurs
16 in anyone after death -- not just the degree of
17 stiffening, but whether rigor mortis is fully
18 developed. These changes take place within an
19 average period of time.
20 The other factor that may be of some help
21 in determining time of death is the presence of post
22 mortem lividity, the pooling of the blood, and
23 whether or not the lividity is fixed at the time of
24 examination.
25 There are other factors that may have

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importance in determining time of death. If the individual's daily habits are well-known, then based upon whether the individual is dressed, ready to go out or go to bed, whether there is food in the stomach and the nature of the food, these other factors also may be of help in determining time of death.
Q Okay. Is the environment in which the body is found, does that affect these factors which you've described?
A Yes, the environment is crucial in terms of the post mortem changes and the time it takes for them to develop.
Q A body found in water, does that affect a time of death in an attempt to ascertain a time of death?
A Typically, if a body is found in cold water, the post mortem changes will be slowed down to some extent as opposed to a body found in the, you know, in a room at room temperature.
Q Now, you also testified, you described one of the things that you would look for would be fixed lividity. For the members of the jury, could you describe what you mean by that? What is lividity and when does it becomes fixed?

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A When the heart stops pumping blood throughout the body, which obviously occurs when somebody dies. The heart stops. Blood, like any other fluid, will find its own level by gravity. It

will settle with gravity. And as the blood settles in the tissues, the body takes on this purplish color because of the blood showing through the skin.
As I say, this lividity usually starts to become apparent within two to four hours after death. Sometimes it's little sooner than that. After a period of time, usually not less than eight hours, sometimes a much longer period of time, the pooling of the blood, the lividity will fix in the tissues where it is settled up until about eight hours or so.
If one moves a body, if a body is found face down, and four or five hours after death this individual is found and the body is turned over, placed on the back, then the pooling of blood will change direction and start pooling toward the back. But after a period of eight to twelve hours, the blood is fixed in that location. So that moving the body will not alter the distribution of the lividity.

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Q Okay. And given the example that you've just given, if someone had fixed lividity on their right side, what could you conclude about where they were when lividity became fixed?
A Lying, obviously, lying on their right side for a period of, considerable period of time following death.
Q Okay. Now, were you able to apply these principles which you've described to Mrs. Lacs' situation?

11 A The basic alteration which was assessed
12 apart from lividity was fixed, was the presence or,
13 I should say, absence of rigor mortis in Mrs. Lacs.
14 Q Okay. What do you conclude based on
15 that observation?
16 A Under average conditions, rigor mortis
17 develops over a set period of time. As I say, there
18 are obviously always exceptions. But generally
19 speaking, rigor mortis will be fully developed
20 within 12 to 18 hours. It will usually stay for a
21 period of time and start disappearing somewhere
22 between 24 to 36 hours and will be gone, say, 48
23 hours following death. This is sort of an average
24 temperature environment, average conditions.
25 Q A body found in water would vary from

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1 those figures by virtue of being in water, correct?
2 A The changes would be a little delayed by
3 being in water.
4 Q And are you familiar with a principle --
5 I may be misstating it -- known as skin slippage?
6 A Yes.
7 Q Okay. What's that?
8 A The skin slippage is a phenomenon which
9 occurs when a body starts to decompose and the outer
10 layers of the skin, outer epidermal layers separate
11 from the underlying skin. Fluid accumulates
12 underneath the skin surface and the skin breaks and
13 slides off from the underneath layers of the deeper
14 skin.
15 Q Okay. Was that present in this case?
16 A No.

17 Q Now, based on these principles which
18 you've described and your review of the autopsy
19 which was performed in this case, can you state
20 within a reasonable degree of medical certainty a
21 range of time prior to the autopsy having been
22 performed in which Mrs. Lacs was killed?
23 A A broad range, yes.
24 Q Okay.
25 A I would say that the death occurred at

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1 least 24 hours prior to, actually prior to the
2 examination by the Deputy Medical Examiner at the
3 scene, and it could easily have been 36 to 48 hours
4 or even more, based on the body changes.
5 Q If someone would attempt to testify to a
6 specific period of time, say within four or five
7 hours, is it your opinion that that is possible to
8 do?
9 A No.
10 Q If I could have the Court's indulgence
11 for just a minute.
12 Now, are you considering the fact in this
13 case that the -- well, were you able to conclude
14 within a reasonable degree of medical certainty,
15 based on your observations, the autopsy report and
16 so forth, what the condition of the water was in
17 this case as far as temperature goes?
18 A Based on the condition of the deceased,
19 the water in the bath could not have been hot.
20 Q Okay. And why do you say that?
21 A Because when an individual is in a tub
22 of water at bathing temperature, I don't mean

23 scalding hot, but at a temperature that would be
24 considered comfortable for bathing, if an individual
25 dies in water at such a temperature, then the skin

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1 burns. They look as though they're scalded.
2 The temperature of the water need only be
3 a few degrees warmer than body temperature for these
4 post mortem burns to occur. The fact that there was
5 no such burning on Miss Lacs would indicate that the
6 bath water was cool at most.
7 Q Thank you very much, Doctor. I have no
8 further questions. Your witness.
9 CROSS EXAMINATION
10 BY MR. SCHLAICH:
11 Q Doctor, are you familiar with a doctor
12 named Russell Fisher?
13 A Yes.
14 Q In fact, Russell Fisher was your boss at
15 one point in time, wasn't he?
16 A Yes, he was.
17 Q He was Chief Medical Examiner for the
18 State of Maryland?
19 A That is correct.
20 Q And he wrote one of the leading
21 textbooks on forensic pathology called Medico-Legal
22 Death Investigation, correct?
23 A He did write a book, yes,
24 Q Okay. Well, in fact, in Maryland's
25 M.E.'s office, once upon a time that was called the

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1 bible, wasn't?
2 A When the person who wrote it is your
3 chief, that is your tendency.
4 Q You've got a new chief for the last few
5 years. He doesn't call it the bible any more, is
6 that correct?
7 A That is correct.
8 Q But the time range you gave us for rigor
9 are right out of the doctor's book, Dr. Fisher's
10 book, aren't they?
11 A I have no idea. I haven't read it
12 recently.
13 Q Now, you've testified that one of the
14 things that would be of primary importance to you in
15 determining the range of time of death would be to
16 know when the victim was last known to be alive or
17 reported to be alive by someone, correct?
18 A That was, I was using that in the whole
19 scheme of things. I wasn't necessarily meaning for
20 me that's important.
21 Q That's something you would check if you
22 were trying to figure out a time of death, isn't it?
23 A Well, it's useful to know when they're
24 last seen alive.
25 Q In Miss Lacs' case, you didn't know that

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1 somebody had said that they saw her alive at 10:30
2 on Friday morning?
3 MS. BROBST: Objection.
4 THE COURT: Sustained. That's not the

testimony. Last spoke.
BY MR. SCHLAICH:
Q I'm sorry. Let me correct myself. You were not told that, in Miss Lacs' case, someone said that they spoke with her by telephone at approximately 10:30 a.m. on Friday morning, the 16th of September, correct?
A I was not told that, yes.
Q However, if she were alive at that time on Friday morning, that would be consistent with the range of death you've given us, agreed?
A Probably. I'm trying to work backwards.
Q Let's do that.
A That would be, that would be within 48 hours, certainly.
Q Right. In fact, it's within that range of 24 to 48 from Dr. Felsenberg's examination at 9 p.m. on Saturday?
A Yes.
Q Right. Could I have Exhibit Four,

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please?
Doctor, let me show you what's been introduced as Defense Exhibit Four. Have you ever seen that before?
A Not specifically.
Q Okay. Do you know what it is?
A Yes.
Q What is it?
A This is a certified copy of the death certificate that was issued on Florence Lacs.

Q Okay. And these are things that your Assistant M.E.'s would fill out, is that correct?
A The original, yes.
Q All right. This is direct copy of that original, you would agree?
A This is a copy of the original as put out by our office, with considerably more information added subsequently.
Q Okay. And it's signed by Dr. Korell?
A Yes, it is.
Q Okay. When it was submitted to the State for recordkeeping, she estimated a time of death, the date of death as being Friday, the 16th of September, correct?
A That is what it says, yes.

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Q Now, you said that you were called in to consult with Dr. Korell in this case?
A Dr. Korell consulted me. This wasn't any major event.
Q She did not consult with you until July of 1989, correct?
A I don't remember specifically when it was. But it was around about that time.
Q Okay. It wasn't back in September of 1988 when she did the autopsy?
A No.
Q And isn't it true that she consulted with you in July when she was told that her date of death of 9/16 would be inconsistent with the State's facts in this case?
A I don't recall her putting it in those

17 terms at all.
18 Q Okay. You were present when your boss,
19 Dr. Smialek, made a call to the defense attorneys in
20 this case to tell us about that change, weren't you?
21 A No.
22 Q You weren't present?
23 A No.
24 Q You knew a conversation took place, is
25 that correct?

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1 A No.
2 Q The end result of your conversation or
3 consultation, rather, with Dr. Korell in July was
4 that you pointed out to her she could extend her
5 range back to 48 hours, correct?
6 A Yes. Oh, yes.
7 Q And that's because the body was in cold
8 water, in your opinion?
9 A In cold water and also because of the
10 post mortem changes which had occurred since, time,
11 since death.
12 Q You were aware that Dr. Felsenberg, when
13 he found the body, found it only halfway in this
14 cold water, correct?
15 A I don't know how much of her was under
16 water, quite honestly, when Dr. Felsenberg --
17 Q So you didn't check that?
18 A My impression was that most of it was
19 under water.
20 Q That was your impression. No other
21 questions, Your Honor.

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5 MS. BROBST: Your Honor, I move at this
6 time to introduce State's Exhibit Number 47, the
7 Pre-Sentence Investigation prepared in this case.
8 THE COURT: What exhibit is that?
9 MS. BROBST: 47, Your Honor.
10 THE COURT: What is it?
11 THE CLERK: The P.S.I.
12 THE COURT: The number?
13 THE CLERK: 47.
14 THE COURT: 47.
15 (State's Exhibit No. 47, PSI, was entered
16 in evidence.)

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14 BY MS. COFFIN: [WITNESS: ROBERT WEINBERG]
15 Q Mr. Weinberg, in September of 1988,
16 where did you work?
17 A I was a subcontractor with my brother
18 and myself, were painting subcontractors for Clark
19 Manor Apartments in Woodlawn.
20 Q What's your brother's name?
21 A Joseph Weinberg.
22 Q I'm going to direct your attention to
23 September 14th, 1988, which would have been a
24 Wednesday. Did you go to work on Wednesday at the
25 Clark Manor Apartments?

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1 A What was date again, ma'am?
2 Q The 14th.

A Yes. About 10:00 in the morning I came up.
Q When you arrived at the work site, was there anything unusual at that time?
A Nothing unusual. Just that I, I went to find where my brother was at, found him at the apartment that he was already, or the building he was working at, and at that time he stated that he had hired a helper.
Q Did he introduce you to that helper?
A Yes, he did.
Q And who was that helper?
A He said the helper's name was Kevin Wiggins.
Q Do you see that person in court here today?
A This gentleman right here.
Q For the record, the witness has identified the defendant.
Did you work with the defendant that day, on the 14th?
A Yes, I did.
THE COURT: Can you keep your voice up,

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please?
A Sir?
THE COURT: Speak a little bit louder so the jury can hear you.
A Yes. sorry.
BY MS. COFFIN:
Q At that time, did he speak about himself? Did you get to know him?

A Just vaguely. He just said that he was from the area and that was all. You know, that he needed a job.
Q And what were his duties in reference to what you were going to be doing?
A Just anything that we needed done. I took him with me that particular day to help install ceilings and in furnace rooms, dry wall ceilings in furnace rooms. And he was to help us touch up painting and carry around materials. Whatever we had to do.
Q Now, directing your attention to September 15th, 1988, which would have been Thursday, did you report to work on Thursday?
A Yes, I did.
Q And did Kevin Wiggins also report to work?

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A Yes. Yes, he did.
Q What was the work you were going to be doing on Thursday?
A Okay. We were, at that date, we were at 1951 Woodlawn Drive, Apartment F, which was a vacant apartment. We were touching, what you call touching up the apartment, getting it ready for a move in, new move in.
My brother had already started the apartment, was just about completed, and that is where myself and Mr. Wiggins ended up in that morning, to touch up that apartment, for work for the apartments.
Q How long did you say you worked in the

15 apartment?
16 A A couple hours, maybe.
17 Q On Thursday, in the morning, when you
18 were preparing to go to work, did there come a time
19 when anything happened as you were in the parking
20 lot?
21 A Yes. We were, myself and Mr. Wiggins
22 were out near my brother's truck or our work truck
23 and I had instructed Kenneth to, Kevin, rather --
24 I'm sorry -- to straighten up the truck, at which
25 time some lady from the building called over to,

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1 apparently to us, which I did not hear, Mr. Wiggins
2 heard, and directed my attention to it and said that
3 this lady apparently must be speaking to us.
4 When I looked over, I asked if she was
5 talking to me and she said yes. She was, you know,
6 calling from her window. She asked me if I was
7 blocking her car so that, you know, she couldn't get
8 out, or if she could get out, was my truck blocking
9 the car. I said no at that time and that was about
10 it.
11 Q Did she identify the car that she was --
12 A I asked her which car. It was only one
13 car there. It was a little red car. I don't know
14 what the type, make or model car it was.
15 Q Did you come to find out who that lady
16 was at a later time?
17 A I don't recall her name but I recall
18 what, you know, I recall what happened to her, yes.
19 I mean, reading about it in the paper, newspaper.
20 Q What happened to her?

21 MR. SCHLAICH: Objection.
22 THE COURT: Sustained.
23 Q During the course of cleaning out the
24 trucks, you said the dry wall was removed from the
25 truck?

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1 MR. SCHLAICH: Objection.
2 A Yes, ma'am. We were cleaning out my
3 truck which had dry wall pieces in it, yes.
4 Q What did you do next?
5 A I was going back and forth from the,
6 from the apartment, Apartment F, and Kevin was
7 clearing out the truck. He also was going back and
8 forth from the apartment, the vacant apartment where
9 we were working at, bringing materials out and
10 clearing the truck at the same time.
11 Q Was there any time during that day that
12 the defendant was alone in Apartment F?
13 A I couldn't say for sure whether he was
14 alone or not, you know, for any length of time or
15 anything. I'm sure five or ten minutes picking up
16 material, we all were, in and out. So if you wanted
17 to say he was alone for a couple minutes, yeah.
18 Q What time did you stop work on Thursday?
19 A About 4, about 4:30 or so.
20 Q And what happened when you stopped work?
21 A Well, we had cleared out the apartment,
22 did some other various things around the apartment
23 complex, and we went back to the maintenance shop
24 where we all go in the morning and in the evenings
25 to meet with the maintenance manager. And myself,

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my brother, Kevin, my mother used to work there, also, and a few other contractors were back there, at which time I told Mr. Wiggins he could go home for the day, which he did.
Q Approximately what time was that, when you told him he could leave?
A About 4:45 or so.
Q What, if anything, happened next?
A Well, we were sitting around, myself, my brother and the rest of the people who worked on the premises, and about 20 minutes later or so, Mr. Wiggins came back and said that he had removed the dry wall that we had from the side the building and placed it in front of the building.
Q Was that --
A Which was a couple of pieces, two pieces, maybe three foot by four foot apiece. I don't remember the exact size.
Q How much would a piece of a dry wall like that take, weigh?
A How much would it weigh? About 25 to 30 pounds. Maybe 30 pounds.
Q Have you yourself ever moved dry wall of that weight and size?
A Yes.

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Q And approximately how much time does it take to move?
A A couple of minutes, depending on where you're putting it.

Q Had you directed the defendant to move that dry wall?
A No, I did not. Not at that time. I already told him to go home.
Q What did you say to him when he came back and said, I moved the dry wall?
A I asked him why he did it. He just said that he had forgotten to move it from that place to the front of the building and I told him that, you know, that I had released him from work and that I was not going to pay from the time that I had already sent him home from.
Q Then the next day being a Friday, the 16th, did the defendant appear at work on the 16th?
A One of these days, he didn't return. He didn't show up for work. Friday -- what day was that? I'm sorry, ma'am.
Q Friday. That would have been the 16th.
A Yes. He came to work approximately 9, 8:30 a.m.
Q And how long did he stay at work on

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Friday?
A Approximately two hours. It was around 10 a.m., he asked me to use the shop phone, the maintenance shop where we all go. He asked me if he could go home because something was happening, something like an eviction or something. From what I understand, he was being evicted or somebody he knew was being evicted.
Q And did you release him from work?
A Yes, we did.

Q Did he come back at all on Friday?
A No, he didn't.
Q Then Monday, which would have been the 19th?
A He didn't show up for work on the 19th, no.
Q Was he told to appear at work on the 19th?
A Well, yeah. I told him Friday when he had left that if he didn't come back Friday evening, make sure he came back on Monday morning, yes.
Q What happened when he didn't appear?
A Well, when he didn't come back to work Monday, of course my brother and I spoke about it. We needed people that would be coming in, you know,

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on a daily basis. And we decided that when he came back, we were going to tell him that if he couldn't come in after a weekend, then he should not, couldn't work for us.
Q Did there come a time when he ever came back to work?
A Yes. He came back to work about Wednesday or, on 10:30 a.m. on Tuesday, which was the 20th. And at that time my brother and I told him that we didn't need him any longer. That was the end of that.
Q Can you, from the position, this is taking you back to Thursday, which is the 15th -- when the lady called from her apartment and asked you about her car being blocked in, do you know from which apartment she was calling from?

A She was calling from the front apartment. If you were facing in front of the building, 1951 Woodlawn Drive, she would be the very first apartment on the walk-in landing level on the left-hand side.
Q And where is that in location to the apartment you were working on?
A Directly across.
Q And do you remember the address or the

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number of that apartment?
A If the apartment I was working on is F -- I don't -- that is probably B or C. I'm not sure.
Q Can I get State's Exhibit Number 3? I'm going to show you what's been marked as Exhibit Number Two. On this exhibit, can you indicate which apartment she was calling from?
A Yes. Okay. You would come into the entrance, which would be here, she was calling from Apartment C, which would be the very first apartment on the left-hand side when you walk in.
Q Thank you. That's all the questions I have.
MR. SCHLAICH: Court's indulgence for one second.
(Pause.)
CROSS EXAMINATION
BY MS. NETHERCOTT:
Q Mr. Weinberg, you worked as a contractor, is that correct, for the apartment complexes?

23 A Subcontractor.
24 Q A subcontractor?
25 A Yes, ma'am.

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1 Q Okay. When we talk about the apartment
2 complexes, we're talking about a large group of
3 apartments, correct?
4 A Yes, ma'am.
5 Q In fact, they're on both sides of the
6 street, right?
7 A Yes, they are.
8 Q And the maintenance office that you're
9 describing is some distance from the apartment as
10 you've just identified in those pictures, correct?
11 A Across the street and a building down
12 across the street.
13 Q So it takes some time to get from that
14 apartment complex to the maintenance office,
15 correct?
16 A Approximately five minutes.
17 Q Walking or riding?
18 A Walking.
19 Q Okay. Now, you didn't have a key to get
20 into the apartments, right?
21 A No, ma'am.
22 Q And in fact, the people who worked for
23 you didn't have a key, either, correct?
24 A No, ma'am.
25 Q So in fact, Mr. Wiggins wouldn't have a

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1 key, right?
2 A No, ma'am.
3 Q Okay. Mr. Weinberg, this sheet rock
4 that's at issue here, it was, in fact, moved, right?
5 A Yes, it was.
6 Q So he did what he told you he had done,
7 right?
8 A Yes, he did.
9 Q And on Friday, the 16th of September, he
10 showed up at, in fact, he showed up for work early
11 that day, right? I think he showed up at 8:00 that
12 morning?
13 A I have it written down as 8:30 a.m. I
14 can't recall.
15 Q He was there promptly?
16 A He was there promptly, yes.
17 Q Mr. Weinberg, just one last point. I
18 think you testified during your direct examination
19 here that on that Thursday, in September, that you
20 finished up work about 4:30 that day?
21 A Thursday being what date, ma'am?
22 Q Bear with me for a second. The 15th of
23 September. I believe that was your testimony on
24 direct. You could be a few minutes off on that,
25 right?

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1 I could be five minutes either way, one
2 way or the other.
3 Q In fact, you gave a statement to the
4 police back in September, on the 27th?

5 A Um-hum.
6 Q And you indicated a different time at
7 that time, right?
8 A I don't recall exactly what time I
9 indicated. Whatever time it was, it was within four
10 to ten minutes range. I don't, you know, I don't
11 have a time card. We didn't have a time clock.
12 Q Okay. I understand that. So if I were
13 to tell you that you gave a statement, actually you
14 finished up about 4:45 that day, that would probably
15 be correct, right?
16 A It could be, yeah.
17 Q That was something given closer to the
18 incident, right?
19 A Yeah. The day that, yeah. Yeah. 4:45.
20 I do have it here. I'm sorry.

* * * *

In the Circuit Court for Baltimore County

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins

Reporter's Official Transcript of Proceedings
Tuesday, October 17, 1989
Towson, Maryland

Before:
Honorable J. William Hinkel, Judge and a Jury

* * * *

Page 3

* * * *

4 MS. NETHERCOTT: Your Honor, defense would
5 call Chentell Greenwood.

* * * *

19 Q Can you speak up, Chentell, so everybody
20 can hear you? Speak into the microphone.
21 A Chentell Antoinette Greenwood.
22 Q That's better. Thank you. Chentell,
23 how old are you?
24 A Thirteen.
25 Q Where do you live?

Page 4

1 A 1967 Woodlawn Drive. Apartment B.
2 Q Okay. Were you living there back in
3 September of 1988?
4 A Yes. Yes.
5 Q And do you remember back on Thursday,

6 September 15th, 1988?
7 A Yes.
8 Q Do you remember being in the hallway
9 with your friend, Chianti?
10 A Yes, and Shanita.
11 Q And Shanita. Do you remember that?
12 A Yes.
13 Q Do you remember seeing someone you knew
14 as Miss Florence in the hallway that day?
15 A Yes.
16 Q Tell us what she was wearing, if you
17 remember.
18 A A white long sleeve shirt and a red
19 pleated skirt.
20 Q Okay. Did you tell the police officer
21 that on the 17th about that? Do you remember that?
22 A Yes.
23 Q Okay. No further questions.
24 CROSS EXAMINATION
25 BY MS. BROBST:

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1 Q Chentell, what time of day was it when
2 you saw Miss Florence in the hall with Chianti and
3 Chanita?
4 A About 5 or 5:30.
5 Q 5, 5:30. And it was on Thursday?
6 A Yes.
7 Q Who else did you see in the hallway that
8 day?
9 A Miss Florence and the painter.
10 Whatever.
11 Q I can't hear you. Can you speak up?

12 A The, Miss Florence and the man that
13 walked up.
14 Q Can you describe that man?
15 A He had on gray sweat pants and a white,
16 I think it was long sleeve or short shirt.
17 Q And how tall was he?
18 A About, about 5'3", I don't know.
18 Q I'm sorry. I can't hear you.
20 A About 5'3".
21 Q 5'3"? How tall are you?
22 A I don't know.
23 Q You don't know how tall you are? Would
24 you say he was short or tall or average?
25 A Average.

Page 6

1 Q Average? And how about build? Was he
2 fat or skinny or average?
3 A He was average.
4 Q Okay. Black man or a white man?
5 A Black man.
6 Q Did he say anything?
7 A He said, thank you for watching the
8 sheet rock for me, and she said, I knew wouldn't
9 nobody mess with it.
10 Q Now, did you talk to the police about
11 that?
12 A Yes.
13 Q And did there later come a time when a
14 policeman came and showed you photographs?
15 MR. SCHLAICH: Objection.
16 THE COURT: Sustained.
17 BY MS. BROBST:

18 Q What happened after you heard Ms.
19 Florence and this man talk?
20 A The man went out the door and we all
21 left.
22 Q And what time would that have been?
23 A About 5:40.

* * * *

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[WITNESS: OFFICER GARRETT LEONARD]
1 BY MS. NETHERCOTT:
2 Q Good morning, Officer Leonard.
3 A Good morning, ma'am.
4 Q Officer, you're assigned to Precinct 2,
5 is that correct?
6 A Yes ma'am.
7 Q And that's in the Woodlawn area?
8 A Yes, ma'am.
9 Q Were you stationed there back in
10 September of 1988?
11 A Yes, ma'am.
12 Q Do you recall having occasion to take a
13 missing person report back in September of '88?
14 A Yes, ma'am.
15 Q And do you recall the date?
16 A No, ma'am, not offhand.
17 Q Okay. I'll show you this piece of
18 paper. It's marked Defense Exhibit One. Ask you if
19 you recognize this document.
20 A Yes, ma'am. This is the missing persons
21 report that I filed on September 15th, 1988, or
22 September 17th, 1988.
23 Q And you filled that out, right?
24 A Yes, ma'am.

25 Q How did you have occasion to take that

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1 report, officer?
2 A Ms. Elizabeth Laine contacted the
3 Baltimore County Police Department in reference to a
4 missing person, Ms. Lacs.
5 Q Okay. Can you tell the Court what is in
6 the block of that report giving a description of the
7 missing person?
8 MS. BROBST: Objection. I'd ask to
9 approach, Your Honor.
10 THE COURT: Okay.
11 (Counsel and defendant approached the
12 bench and the following ensued:)
13 MS. BROBST: Your Honor, that's a hearsay
14 statement made by a witness who has testified and
15 when asked what she told the office with respect to
16 what she last saw the victim wearing, said that she
17 did not remember ever saying that she was wearing a
18 red dress. Therefore, it is not a prior
19 inconsistent statement. She said that she did not
20 remember.
21 THE COURT: Overruled. I'm going to let
22 him ask it.
23 (Counsel and defendant returned to trial
24 tables.)
25 BY MS. NETHERCOTT:

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1 Q Let me just, back up for a second,
2 Officer. Can you tell me what the source was for

the information that's contained in that report?
A It was a combined source of Ms. Laine and I believe it was two or three other ladies who were also, also were co-complainants, if you will. They were all present when I arrived there.
Q Okay. Now, can you read for us the description that is provided with regard to the victim's clothing?
A Yes, ma'am. It says, last seen wearing a red dress.
Q Okay. I have no further questions, Your Honor.

CROSS EXAMINATION

BY MS. BROBST:

Q Officer, you said you spoke to a number of ladies. Were they all in the same place when you arrived?
A Yes, ma'am, they were. That was 6611 Krone Drive.
Q Approximately how many ladies do you think were present, if you recall?
A Including Ms. Laine? There were four others, I believe.

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Q And you say that your report is a compilation of the things that they told to you?
A Yes, ma'am. All of them told me their opinion of what she was wearing last, what color her eyes were, that kind of thing.
Q Okay. And were they all sort of talking at once?
A Pretty much so, yes, ma'am.

Q I assume they were fairly upset?
A They were very concerned, yes, ma'am.
Q And excited?
A Yes, ma'am.

MS. BROBST: No further questions.

THE COURT: Anything else?

RE-DIRECT EXAMINATION

BY MS. NETHERCOTT:

Q Officer Laine, do you recall what these individuals told you regarding the last time they had seen Ms. Lacs?
A The last time that they had seen her, I believe, was on the 15th, which was a Thursday, around 4:00 p.m. It was a Senior Citizens meeting down in the Village, Woodlawn Village.

* * * *

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MS. NETHERCOTT: Your Honor, I'd move at this time to introduce, I believe it's marked as Defense One.

THE COURT: Defendant's One.

(Defendant's Exhibit No. 1, missing persons report, was entered in evidence.)

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[WITNESS: DR. SILVIA COMPARINI]

BY MS. NETHERCOTT:

Q Dr. Comparini, could you tell us, please, where you are employed?
A I am a Deputy Medical Examiner for the

24 Office of the Chief Medical Examiner in the District
25 of Columbia in Washington, D.C.

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1 Q And whet are your duties as a medical
2 examiner in the District of Columbia?
3 A As a deputy medical examiner, my duties
4 involve the investigation of deaths that fall under
5 the jurisdiction of the medical examiner. That is
6 to say, deaths that occur in a violent fashion, such
7 as homicides or accidental, suicides, or
8 undetermined in the sense that we don't know which
9 of these manner, which of these manners occurred.
10 We also are involved in the natural deaths when
11 these deaths occur in an unattended or unexpected
12 fashion.
13 Q Doctor, could you describe for us,
14 please, your educational background?
15 A I obtained my medical degree from the
16 Catholic University of Chile in 1967 and came to the
17 United States almost immediately for post-graduate
18 training. This consisted of two years of internship
19 as required by the State of California for medical
20 graduates, non-citizens, one of which I did in the
21 State of New York, and the second is Surgical
22 Internship in Highland General Hospital in Oakland,
23 California.
24 I stayed in Highland General Hospital and
25 went into the field of pathology and completed two

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1 years of anatomic pathology training and one year of

2 clinical laboratory pathological training. At this
3 time I did my fourth year of training, transferred
4 to the University of California in San Francisco.
5 That's UCSF.
6 After I completed the four years of
7 required training in the field of pathology, I
8 received an LEAA, Law Enforcement Assistant
9 Administration grant, to do a fifth year of training
10 in the field of pathology, and I did it in the field
11 of forensic pathology.
12 This grant was awarded to me by the
13 College of American Pathologists and I did this year
14 of training in the Office of the Chief Medical
15 Examiner in Manhattan, in New York City.
16 Q Doctor, are you licensed to practice
17 medicine?
18 A Yes, I am.
19 Q In what states?
20 A I am currently licensed to practice
21 medicine in the states of New York, California, and
22 the District of Columbia.
23 Q All right. And I think you probably
24 covered some of it, but could you describe for us
25 your employment history?

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1 A After I finished my training, I stayed
2 one year as a medical examiner with the City of New
3 York and then returned to UCSF in San Francisco to
4 do two years of research in the field of forensic
5 serology. At the same time, I practiced part time
6 as a forensic pathologist with the Salano,
7 S-A-L-A-N-O, Salano County Coroner's Office in

8 Valajo, V-A-L-A-J-O, in California and with the
9 County Sheriff's Coroner's Office in Martinez,
10 M-A-R-T-I-N-E-Z, California. And I did this until
11 1980, when I joined the Karn, K-A-R-N, Karn County
12 office in Bakersfield, California. And in 1984 I
13 was appointed Deputy Medical Examiner for the
14 District of Columbia.
15 Q And you have been with the District of
16 Columbia Medical Examiner's Office since 1984?
17 A That is correct.
18 Q All right. In the course of your
19 training and employment, could you tell us roughly
20 how many autopsies you have performed?
21 A I have personally performed over 5,000
22 to 6,000 autopsies and either witnessed or
23 supervised another 7,000.
24 Q Have you written any articles in your
25 field -- excuse me. Strike that. Have you

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1 published any articles in your field?
2 A In the field of pathology, I did. In
3 the field of forensic pathology, I have too much
4 work so I have been able to present two to three
5 papers in the American Academy of Forensic
6 Scientists, of which I am a fellow, just about every
7 year. And the abstracts have been published in the
8 programs.
9 Q Okay. Do you receive journals, medical
10 journals?
11 A Yes, I do.
12 Q Could you tell us which ones?
13 A I subscribe to the New England Journal

14 of Medicine. As a fellow of the International
15 Academy of Pathology, I receive Modern Pathology and
16 Laboratory Medicine. As a fellow of the American
17 Academy of Forensic Scientists, I receive the
18 Journal of Forensic Sciences. As a member of the
19 National Association of Medical Examiners, I receive
20 the Journal of Forensic Medicine and Pathology. And
21 I also receive several other kind of throw-away
22 journals in pathology.
23 Q Doctor, have you previously been
24 recognized as an expert in forensic pathology in any
25 courts?

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1 A Yes, I have.
2 Q Could you tell us which courts?
3 A In New York, in the courts of Manhattan,
4 Bronx and Queens, in California in the courts of
5 Richmond, Fairfield, Valajo. Martinez, Oakland, San
6 Francisco, Bakersfield, Visalia, V-I-S-A-L-I-A,
7 Riverside, and in the District of Columbia in the
8 Superior Court, in Prince Georges County and
9 Leesburg, Virginia.
10 Q Thank you, Doctor. Your Honor, at this
11 time I would offer Dr. Comparini as an expert in the
12 field of medicine and forensic pathology.
13 MS. BROBST: No objection, Your Honor.
14 THE COURT: I'll accept her.
15 MS. NETHERCOTT: Your Honor, at this time
16 I would move to offer into evidence Defense Five.
17 State's now had an opportunity to review that
18 document.
19 MS. BROBST: No objection, Your Honor.

THE COURT: State's Exhibit Five.
MS. BROBST: Defense.
(Defense Exhibit No. 5, weather statistics report, was entered in evidence.)
BY MS. NETHERCOTT:
Q Dr. Comparini, you have described a few

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minutes ago what your duties are as a medical examiner. Directing your attention specifically to the issue of time of death, can you tell the ladies and gentlemen of the jury, is a time of death determination something that is routinely done by a medical examiner?
A Yes, it is.
Q Okay. And it is then possible to give a range on time of death, correct?
A That is what, that's what we only can do is give a range or an estimated time of death. We cannot determine the time of death.
Q You cannot pinpoint it, then?
A That is correct.
Q But you can give a range?
A That is correct.
Q Okay. Now, can you also just explain for us two terms? Can you explain for us the meaning of the term "cause of death?"
A Cause of death is the determination of an illness or injury or some other, several physical, pathological functional states of the body that can be altered and are directly or immediately determining that the individual dies, that is the heart stops, the lungs stop to ventilate, and the

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brain is no longer in operation. And that is what we call -- the pupils are fixed and dilated. That was the old-fashioned determination of a person being dead due to some cause.
Today we have others but that's about it.
Q Okay. Also, can you explain for us, Doctor, the meaning of the term "manner of death?"
Manner of death is the circumstances or the fashion in which the cause of death killed or terminated the life of a person.
Q Okay. And time of death, I think, is self-explanatory, correct? The time someone died?
A Time of death can be determined in different fashions, either by being present at the time of the death, which is what usually happens in the hospitals. And we call that pronounced time of death.
When we just find a body with no attendance, then we refer to time found dead. And when we issue our time of death, we are essentially forensic pathologists estimating the time of death.
Q Now, Doctor, going back for a moment to manner of death, can you describe for us what the different terms are that come under that heading?
A Well, causes of death, there are many,

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many causes of death, and they will continue to increase as our medical abilities increase in making diagnosis or the individual creates more ways in which they can kill themselves, you know. When I

started, ATV's didn't exist and going to the moon
didn't exist.
Manner of death, there are only five, and
this is an international, by international agreement
through WHO, W-H-O, that's the World Health
Organization. We distinguish, I want to give you
little letters that you can remember -- N for
natural, A for accidental, S for suicidal, H for
homicidal, and U for undetermined. That means we
don't know if it is any of the other four manners we
say first. And we refer to this as NASHU,
N-A-S-H-U. And we have to choose from one of
those.
In the District of Columbia, it's unusual,
they're the only area I know that we have another
classification, is unclassified. That means we
desist from classifying some deaths such as
overdoses. So in the District of Columbia, we have
a sixth modality.
Q Doctor, with regard to time of death
determinations, can you explain, please, what

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factors a forensic pathologist could consider in
reaching an opinion on a range of time of death?
A There are three main factors that we
consider and that is the rigor, R-I-G-O-R.
Q Can you explain, please, what that is?
A Rigor is the stiffness that the body
gains with time after death, and it is related to
the fact that muscles, after we die, they shorten.
They don't contract. The body doesn't sit up, you
know, in the cooler of my office.

Once the muscles contract, they stay
contracted and they change with time of this
happening to the muscles.
Q Doctor, can you explain, after death how
much time passes typically before rigor develops?
A Rigor mortis appears almost immediately
after death. It's just not evident in all of the
body. But it begins to develop immediately after
death in some parts of the body first, then others.
Q How long does it remain, typically?
A If will remain in a general fashion, in
a temperate climate, because there will be
variations according to different temperatures at
which the body is at the time that death occurs.
But in general, in a temperate climates, rigor

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mortis will disappear after about 16 hours, it
begins to disappear. And most bodies, by 24 hours,
will already be flaccid again.
Q Okay. Are there others? You mentioned
other things that you take into account. Can you
describe what those are, please?
A The second most useful factor we resort
to is livor or livor, L-I-V-O-R, mortis.
Q Can you explain what that is, please?
A Livor mortis -- that's not the liver,
okay. This is livor in the sense that it's purple.
It comes from Latin. That's what it means --
purple. It's a purple color of the skin that
appears after, immediately begins, also begins
immediately after death.
Q Okay. Can you just explain why that

happens?
A The purple discoloration of the skin is due to the fact that there are in the blood little tiny cells that we call the red cells and these red cells have a pigment. That pigment is in a part of the chemical products that direct the red cell, is called hemoglobin, and that's what gives my pink color to my skin.
Now, this hemoglobin changes color

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constantly. If I stop breathing for a little while, you see I turn kind of purple color because it loses its oxygen. Once it's in the tissues, hemoglobin releases its oxygen so the cells can breathe, so then they come back to the lungs and they get pink again. But after death, there's no more breathing, there's no more oxygenation, and therefore the hemoglobin remains of a so-called blue color will distinguish oxygenated blood as red in color or not oxygenated, or reduced hemoglobin as blue color. This is the purple color that the skin will see if the skin is transparent, will let us see in the different parts of the body. If I die on my back, it will be in the back of my body. If I die and I'm on the front, on my belly, this color will then appear on the front part of my body.
Q Now, Doctor, are there any other changes that occur in a body after death?
A Yes, there are.
Q Could you describe what they are, please?
A After death, the body begins to die now,

not as a whole body that stopped breathing like we described before, but different cells of our body, different parts of our tissues begin to die, too.

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And they die in different order. So we don't die altogether on ourselves.
As this death process occurs, there are different components of tissues in the body and one of the most important is the proteins. This protein makes up our muscles, make up many other structures. And when protein begins to die, we say it denatures. Muscle, as you know, is a lot of protein. And as this denaturing of the muscles take place, the rigidity that we discussed before that appeared goes away.
The consistency and structure of our skin begins to fall apart.
Q Now, Doctor, let me stop you for a moment. It's true, is it not, that these decompositional changes occur in stages, is that correct?
A That is correct.
Q Okay. Could you explain that, please?
A The stages in which this, this decomposition occur, we describe as depending on how we find the body, as early, moderate changes or advanced changes.
Q And can you explain under each of those categories what you see normally?

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A In the early changes, due to this
denaturing that we said, breakdown of the
proteins and the fact that all the bacterias are in
our body and normally living with us and help us
live, take over, and they are called gas-forming
bacterias. They produce putrefax. Just like the
food that you put in from the freezer into the
refrigerator and then if you leave it outside, it
will start to rot. And in this rottening process,
and with the gas-producing bacterias, our face gets
bloated, our eye lids get bloated, our lips get
bloated, the tongue comes out and gets bloated
because of gases pushing out, the skin starts
showing what we call marbling, the enhancement of
the veins and capillaries that are under the skin,
especially in these areas of your body -- the
shoulder area, upper part of the chest. Then the
abdomen also begins to get bloated.
In men, the entire genitalia is completely
bloated and less bloated are the arms and the legs.
Q Now, you're talking here, Doctor, about
early stages of decomposition?
A That is correct.
Q All right. Can you give us a timeframe
for this, please?

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A These manifestations I described,
bloating and marbling, and also I didn't tell you,
but if you would scratch my skin the first 24 to 36
hours, you won't be able to make it slip and peel it

off. But around 36 hours, a little bit, after 24
hours going into 36 hours, if I take the body, when
I'm trying to move the body from the areas of
handling which are like the wrist areas and the legs
to lift the body out, that skin just sloughs off.
We call that skin slippage.
This skin slippage, bloating, marbling
appear within, in a temperate climate, around 24 to
36 hours they begin to appear.
Q Doctor, when you say temperate climate,
what do you mean by that?
A We refer to a temperate climate, the
climate of around 60's, 70 degrees, all year around
if possible, like San Diego, where the humidity is
not extremely high, and it is not like in the desert
like when I was in Bakersfield, exposed to a lot of
dryness and a lot of sun and no humidity.
Q Now, it's true, is it not, that cold, a
cold temperature would slow down these processes, is
that correct?
A Yes. Cold tends to slow down the

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process but not stop it.
Q All right. And when you say cold, if
you could just give us some idea. Do you mean very
cold? What do we mean by cold?
A We refer to cold, a body will look well
preserved if it stays around below the 55, 50
degrees. In 70's, decomposition will proceed in the
way that I described.
Q Now, you've explained for us the early
decompositional changes. Could you explain for us

11 the other two categories that you described?
12 A Moderate changes, we are usually now
13 estimating that death occurs about close to a week
14 to maybe the beginning of the second week after
15 death. And now we have a change. The color of the
16 skin begins to get green. And essentially after
17 about two weeks, white or black or fair-skinned
18 persons will look all kind of black and green.
19 The bloating is much more noticeable. It
20 really is all bulging, the whole face. The eyes,
21 it's difficult to open the eyes to look at the color
22 of the eyes.
23 Q Okay. Doctor, did you have occasion to
24 review materials that I provided you in connection
25 with an autopsy that was performed on a Florence

Page 29

1 Lacs?
2 A Yes, I did.
3 Q Okay. And it's true, isn't it, that I
4 provided you with a copy of the autopsy report?
5 A Yes, you did.
6 Q And also copies of all the crime scene
7 photos?
8 A Yes.
9 Q And you also received copies of the
10 contents of Dr. Felsenberg's report?
11 A Yes, I did.
12 Q Okay. And did you review all those
13 materials?
14 A Yes, I did.
15 Q Okay.
16 Doctor, I ask you at this time if you

17 could step down, Doctor, to just assist the jury.
18 You testified that rigor, livor and other
19 changes that occur in the body after death follow a
20 certain time pattern, is that correct?
21 A That's correct.
22 Q I would like you, if you could, to draw
23 for us just a diagram that can help the jury
24 understand that. Is that better?
25 A I'm going to draw a line here on the

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1 bottom that we're going to use for giving a period
2 of time, and if we call this time zero and this 12
3 hours. This is going to be time. And then in about
4 the same space, 24 hours, and finally out here, we
5 will be close to about 36 hours. So you imagine
6 this is one, two, three, four, five, etc.
7 I'm going to draw a perpendicular line at
8 the point that I marked zero and I am going to grade
9 these phenomenon that we're going to call rigor
10 first or stiffness of the body in one plus, two
11 plus, three plus and four plus. That is beginning
12 of rigor when you move the arms, it feels a little
13 bit stiff. Then stiffness becomes very difficult to
14 move the arm. And finally, great force so even when
15 I try with my whole body sometimes, I can't strain
16 the arms. I have to get one of my big guys in the
17 office to break, we call that break rigor mortis.
18 So this is one plus, two plus, three plus,
19 and finally four plus.
20 As we said, rigor mortis begins to appear
21 right at the time of death and it develops in pretty
22 much a consistent fashion until it reaches 12 hours

23 when we say rigor is fully developed. I'm going to
24 write "fully developed." I'm going to write "rigor,
25 fully developed."

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1 If you permit me, I'm going to leave
2 this. Nobody has done the studies completely, this
3 is very nominal. None would take place in this body
4 in this fashion, in other words, in an increasing
5 fashion.
6 Then with time, most bodies in a temperate
7 climate will lose this rigidity because of what we
8 said. The proteins will leave, denature or break
9 down, and the bacterias take over. And most bodies
10 in a temperate climate, 24 hours, really you can
11 start feeling the body beginning to be a little bit
12 flaccid around 16 hours. And by 24, most bodies are
13 usually flaccid and sometimes we can extend it up to
14 36 hours. We have here the range.
15 Q Can you explain, Doctor, what flaccid
16 means? What does that term mean?
17 A Flaccid is the muscles are so loosened
18 up, there's no shortening or contraction of the
19 muscle, just limp.
20 Q No rigor, is that correct?
21 A No rigor. Like the first time when the
22 body dies, if you try to pick up a dead body, it's
23 very dead. You need two people usually to put them
24 on your gurney if they have not developed rigor
25 mortis. When they're rigor, they're quite easy to

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1 move.
2 Do you have another color?
3 I am going to overlap in the same drawing
4 the livor mortis or the changes of the color of the
5 body. They also begin more or less also at the time
6 of death. And livor mortis similarly progresses in
7 a fashion such that within about 12 hours it is
8 almost completely, almost completed, and we call
9 that it is fixed. Livor by 12 hours is fixed. That
10 statement we make because, in the first six to eight
11 hours, livor mortis can be reinstated if we change
12 the position of the body. But after about 8 to 12
13 hours, it's fixed and it will remain fixed all the
14 time. It will not go back like rigor mortis. You
15 won't change back.
16 Q All right. Now, Doctor, the autopsy
17 that was performed on Ms. Lacs was done at 9 a.m. on
18 the morning of September 18th, correct, according to
19 the autopsy report?
20 A According to the autopsy report, yes.
21 Q Give you a hand here, go on to the next,
22 different sheet of paper here --all right. Maybe
23 to keep it simpler, we'll just keep it on this
24 chart. Can you describe for us the findings with
25 regard to rigor and livor on the morning of the 18th

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1 at 9:00 when the autopsy was performed?
2 A According to the autopsy report, the
3 body was completely rigid and livor mortis or livor
4 mortis was present in the back of the deceased, but

there was also some indication that there was some remnants of livor mortis on the right side of the face and right side of the shoulder area, and there were indications in the eyes that there was also what we call hemorrhages which, when you are on the same position for a long time, they can develop in an eye and they are not an indication, specific indication of part of livor mortis.
Q Well, Doctor, just so we're clear, so that we understand this in laymen's terms, it's correct, is it not, based on Dr. Korell's description of the body, on the morning of the 18th that rigor was not present, correct?
A Rigor was not present.
Q Right. Okay. Now --
A I was talking about livor mortis.
Q I'm sorry. But with respect to rigor, rigor was not present, is that correct?
A That is correct.
Q Now, going from the morning of the 18th, based on Dr. Korell's description of the body with

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regard to rigor and any other factors that you might consider, such as decompositional changes and livor mortis, can you, to a reasonable degree of medical certainty, render an opinion with regard to time of death, a range or time of death in the case?
A Yes, I can.
Q All right. Can you tell us what that opinion is?
A The findings in the body and the factors we described are consistent with the deceased having

been dead not more than 24 to 36 hours from the time the body's examined in the Medical Examiner's Office, that is September 18th at --
Q Nine a.m.
A -- nine a.m.
Q All right. And can you just briefly explain how, explain to the ladies and gentlemen of the jury how it is that you have arrived at that timeframe?
A If the body was limp, then it means that he had lost all its rigidity. So we are about this timeframe, And if we call this period of time here X, is going to be September 18th at 9 a.m.?
Q Yes.
A We go back 24 hours, it would be around

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here, which it would be September --
Q 17th.
A -- 17th at 9 p.m. And if we go another 36 hours, we will be here, and that means that on September 17th at 9 a.m.
Q All right. Just so we're clear, Doctor. Twenty-four hours from September 18th at 9 a.m. would be September 17th at 9 a.m., correct?
A You're right. And then minus 12 would be p.m.
Q 9 p.m., correct?
A That is correct. Thank you.
Q And it's the 16th, correct, before the 17th?
A That is right. My mathematics is not too good today.

17 Q Okay. Doctor, take the stand again,
18 please.
19 Court's indulgence for one moment. I have
20 no further questions, Your Honor.
21 THE COURT: Cross examine.
22 CROSS EXAMINATION
23 BY MS. BROBST:
24 Q Thank you, Your Honor. Dr. Comparini,
25 are you familiar with the term "board certified"?

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1 A Yes, I am.
2 Q What does that mean?
3 A Board certification in the field of
4 medicine is the status in which a physician has
5 passed some tests by some board that, in the case of
6 pathology is called the American Board of
7 Pathology. And these tests are usually taken at the
8 time that you finish your residency and it kind of
9 is a way in which we test the uniformity of the
10 training systems in the United States.
11 Q All right. So if one passes this test,
12 one becomes board certified?
13 A That is correct.
14 Q Are you board certified in your field?
15 A No. I passed only the forensic
16 competence test of the American Board of Pathology,
17 1977, and I have not taken another part that is
18 necessary to obtain that certification.
19 Q Now, have you ever testified for the
20 State in a death penalty proceeding?
21 A No, I have not.
22 Q Have you previously testified for the

23 defense in such a proceeding?
24 A No, I have not.
25 Q Did you write a written opinion for your

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1 testimony in this case?
2 A No, I did not.
3 Q Is that unusual?
4 A No, it is not.
5 Q It's not unusual that an expert would
6 not write a written opinion?
7 A No, it is not.
8 Q Did you take notes when you conducted
9 your investigation into this case?
10 A I had the reports that I examined at the
11 first conversation I had with counsel.
12 Q Okay. The first conversation that you
13 had with counsel. But did you take any notes about
14 your opinion?
15 A No, I did not.
16 Q Did you talk to the investigators, the
17 police investigators in this case?
18 A No, I did not.
19 Q Isn't that something that you would
20 normally do before you would render an opinion in
21 your own courts in Washington, D.C.?
22 A No. We only use the police report,
23 sometimes depending on the case we may need to talk
24 to the detective if we need more information or
25 we'll go back ourselves to the scene. But normally,

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we start our autopsy with a report issued by the police department.
Q Well, if this had been your case in Washington, D.C., isn't this a case in which you would have wanted to talk to the police investigators?
A Oh, most definitely.
Q And you were not able to do so in this case?
A That is correct.
Q in fact, when were you consulted by the defense in the case?
I was consulted, I believe, about the first week of September.
Q And how did that come to be?
A I received a telephone call from counsel.
Q And by the first week of September, you mean in 1989?
A That is correct.
Q Were you anticipating this call or did it just come out of the blue with no --
A Just came out as one more call from an attorney, which we receive many in the office.
Q Okay. Often from defense attorneys?

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A From both. We are a neutral party in the office of the Chief Medical Examiner and we talk both to the defense counsel and to the prosecuting counsel.

Q Did you have a chance to talk to the medical examiners who handled this case for the State of Maryland before you formed an opinion?
A No, I did not.
Q Now, you agree, do you not, that the circumstances in which a body is found are very important in establishing a time of death?
A The circumstances?
Q Yes. The environment, for example, let's start with the environment?
A Oh, yes, yes, they're important.
Q Do you find in establishing the time of death that there is a difference if a body, for example, is found in water?
A No.
Q Does water affect your determination of time of death?
A The estimated time of death?
Q Yes, ma'am.
A You mean if I find a body in the Potomac?

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Q Well, if you have a chance to talk to the investigators and you ascertain that a body was partially submerged in water, would you consider that? Would that be something that you would consider before you form an opinion as to an estimated time of death?
A If it is a small amount of water like in this case, somebody found in a tub, it would not make much difference. If it is a body that was submerged in the, for example, the Potomac, where we

recover them there, where there are other
microorganisms and live flora in the water, then,
yes, it will make a difference.
Q Okay. So, as I understand you, it
makes not to you in determining an estimated time
of death where whether this body was partially
submerged in water prior to being found?
A I will consider it if the body had been
submerged completely, maybe. But when it is
partially submerged and there is not much difference
from one side of the body to the other, then
probably the fact that the body was in the water,
was not such a long time, and therefore did not
cause much differences between one side of the body
and the other.

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Q Now, I notice when you testified with
respect to time of death and were able to draw this
chart for the members of the jury, that you stopped
your chart at 36 hours, is that correct? That's
where you ended?
A That's because I didn't have more
paper.
Q Okay. And when you testified, you said
certain things happen up to 36 hours. And then you
were asked for more advanced stages of decomposition
and you told us what happened at one week and two
weeks after someone is killed, is that correct?
A That is correct.
Q So is there no difference between what
happens at 36 hours and what happens at one week?
A Yes. The decomposition continues to

advance. But major differences so we can give an
early part and advanced changes in our description
are not easy to time and therefore they're kind of,
they can be melting one with another, overlapping
one with another.
Q So these things overlap?
A They can overlap, yes.
Q So when you say 36 hours, it could be 38
hours?

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A Oh, yes, definitely
Q 40 hours?
A Yes.
Q These things are all an estimate, kind
of a continuum of decomposition, is that correct?
A That is correct.
Q So could it be 44 hours when you say 36
hours?
A By 48 hours, most definitely the body
will be limp.
Q Limp at 48 hours?
A Oh, yes.
Q Were you told when you discussed this
case with defense counsel that their theory was that
it was less than 48 hours? Was this something that
they discussed with you on the phone?
MR. SCHLAICH: Objection.
THE COURT: Overruled. Did you take such
a statement into consideration?
A I was told that they -- I was asked if I
could estimate the time of death considering certain
parameters. The fact that I learned during the

23 reading of all the material that I requested that
24 there was a discrepancy has nothing to do with the
25 facts that I have placed in the chart that I made.

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1 Q But as I recall, and correct me if I'm
2 wrong, you never mentioned in direct examination
3 anything that occurs at 48 hours. We ended at 36.
4 A Because after 36 and 48, like you very
5 much said, they're quite similar.
6 Q Okay. Now, 36 and 48 hours are quite
7 similar and on your chart as well, you show that
8 livor is fixed at 12 hours and remains so fixed for
9 an indeterminate length of time, is that correct?
10 A That is correct.
11 Q And rigor, the body comes under all
12 these general conditions. And although this is an
13 estimate and subject to some variables, rigor
14 generally ends around 24 hours, is that what you
15 said?
16 A That is correct.
17 Q And that the livor and the rigor remain
18 constant for an indeterminate amount of time, until
19 these more severe forms of decomposition take place?
20 A Oh, yes.
21 Q So a body --
22 A The body is limp and purple.
23 Q Okay.
24 A Once it becomes limp and purple, it
25 stays limp and purple.

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1 Q So a body is limp and purple at 36
2 hours, approximately, because these are all
3 approximates?
4 A That is correct.
5 Q 48 hours?
6 A That is correct.
7 Q 58 hours?
8 A That is correct.
9 Q Limp and purple. All right.
10 A Well, not purple any more. Remember, I
11 said it becomes green around the third, fourth day.
12 Q Third or fourth day. Okay. Great. I'm
13 going to show you some photographs and I would ask
14 you to look at these and see whether you had an
15 opportunity to review these photographs when you
16 performed your investigation in this case.
17 A Yes, I reviewed.
18 Q You have seen those before?
19 A Yes, I have.
20 Q Okay. And specifically, I'll refer to
21 the numbers on the back when I ask you about these.
22 I'm showing you that which has been marked
23 as State's Exhibit Number 28-P. Shows the deceased
24 in a tub of water, somewhat submerged, on her right
25 side. Is this consistent with the livor, the set of

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1 livor which you have described that you read from your
2 autopsy report provided by Dr. Korell?
3 A Yes, it is consistent with the
4 description of livor mortis by the pathologist.

Q And of course, it goes without saying,
you never saw Mrs. Lacs' body?
A That is correct.
Q Because you weren't called in until
September of this year?
A That is correct.
Q Okay. Now, you described a certain
mottling that occurs?
A Marbling. M-A-R-B-L-I-N-G.
Q I'm going to show you State's Exhibit
Number 38-S and ask you whether that photograph of
the right arm of the victim appears to you to be
consistent with this process you described as
marbling?
A No, it does not.
Q Okay. What are those marks? I won't
characterize them.
A These are linear blue marks at the
external aspect of the back of the elbow and then
here part of the arm which is a vein. The lady's
very white and skin of elderly people is very thin,

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so it's easy to see their veins. You get old, that
happens.
So what we're seeing is cephalic,
C-E-P-H-A-L-I-C, the cephalic vein in the surface of
the skin, which, for example, drug addicts use to
inject.
Q Okay. Does anything in that photograph
resemble to you the process you describe as
marbling?
A No.

Q How about State's Exhibit Number 28-T?
Can you explain to me why that photograph is
different from the condition called marbling by you?
A Because there's no marbling here.
Q Okay. How does that look different from
marbling?
A If I could make a drawing, maybe.
Q Fine with me.
A Can I take the photographs?
Q Certainly. It was this one.
A As I explained before, marbling, that is
M-A-R-B-L-I-N-G, comes from marble. Marble has like
little lines that are very, it's conspicuous and
others are very conspicuous. If it usually appears
-- I could draw it.

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If this is the neck and these are the
shoulders and these are the arms and then here
begins the forearm and this, here's the forearm.
These are the wrists and the hands. These are the
breast area, the body.
Marbling appears -- use red ink -- in this
shoulder area in the front and back and little marks
like marbling. And at the same time that this
phenomena appears, beginning of bloating begins and
this skin, instead of looking like normal and
wrinkly, begins to look like distended a little
bit.
So there's two phenomena that occurs that
you can see with your eye. One appears as this
marbling and the other one is slight distention of
the skin. And like I said before, it is not common

17 that it appears early in the, I'm going to say
18 early, within the first 36, 48, to maybe three days
19 in the forearms. It's very unusual to see it in the
20 forearms. On the contrary, as you get to the distal
21 ends of the extremities, the toes and the fingers,
22 they become many times dry. We call the drying
23 effect in the early first about 36, 48, beyond
24 that.
25 You can see a drying effect right in

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1 there, bloating, because of the different kind of
2 skin we have in the palms and in the plantar,
3 plantar, P-L-A-N-T-A-R, the plantar aspect of your
4 feet. May I have the pictures again?
5 Q Yes, ma'am.
6 A Can I show this to the jury?
7 Q Yes, ma'am.
8 A Counsel has referred to these lines
9 here, this is what we call the antecubital forsa.
10 This area here and here, where they put your
11 injections in the hospital, we call it antecubital
12 forsa. It's opposite the elbow. This part of the
13 arm, opposite the elbow.
14 The linear kind of blue, green.
15 THE COURT: Doctor, don't make any
16 markings on that.
17 A No. Blue mark. That is just a vein
18 that is visible through the skin that is so thin.
19 And as I said, skin is transparent. So this is a
20 vein. And then when you look at the remaining of
21 the skin of this arm, it is not distended; it's
22 normal looking. It's a blue-purple mark here in the

23 middle of the forearm and that is something else.
24 That's not marbling. That is a contusion or bruise
25 -- the same. That is in reference to State's

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1 Exhibit Number 28-S as in Sam.
2 On State's Exhibit Number 28-T, as in
3 Thomas, we are seeing the back now of this forearm
4 again, of the right forearm, where there is an
5 entire dark discoloration from tanning from the
6 sun. That's not marbling, not bloated, and doesn't
7 have these little fine lines.
8 And then there's another little
9 purple-blue area that's kind of quadrangular which
10 is different from the one observed in the Exhibit
11 S. The difference is that this is a normal process
12 in elderly people. We call that an ecchymosis.
13 That's suffusional blood, because as we become old
14 our capillaries become fragile and they bleed
15 easily.
16 So no marbling either in T.
17 In State's Exhibit Number 28-U, we have,
18 again, this is lividity, not marbling, and there's
19 one little, again, blue linear, linear, line,
20 linear. Just one single. They don't appear as
21 linear and single. They appear as little marks I
22 made in the red pen, in the shoulder area and upper
23 part of the extremities, in the upper part of the
24 neck, and this beginning of bloating when marbling
25 begins to occur.

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These mottled -- that a mottled -- purple
discolorations consistent with lividity or, what we
discussed about, settling of red cells with time.
Then finally, as State's Exhibit Number
28-V as in Victor, again it's showing the fact that
the deceased was found on her right side and you are
again seeing the process of livor mortis or
lividity, not marbling. It is not common to see
marbling in this part of the face.
MS. NETHERCOTT: Your Honor, at this time
I would ask if the jurors can see those photographs
that the doctor's referring to?
MS. BROBST: No objection.
THE COURT: Would you pass those to the
jurors? These are the same photographs that were
originally submitted to the jury. Okay. Another
question while she's still at the board.
MS. BROBST: No, not while she's at the
board. Doctor, take the stand again, please.
BY MS. BROBST:
Q Now, the skin slippage, didn't you
testify on direct that that occurs about 36 hours?
A After 36 hours, usually.
Q How far after 36 hours?
A Oh, around 48 hours to beyond the second

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day of death is when we handle the body. In
handling, the skin slips and separates.
Q So any time, in other words, from 48
hours to three days, is that what you're saying now,

for skin slippage?
A In a temperate climate, yes.
Q Okay. And how about the marbling?
What's your testimony on that?
A Marbling.
Q Length of time after death in a
temperate climate for marbling? I thought you
testified 36 hours.
A That's again consistent with early
changes of decomposition, which we start seeing
later, about 36 hours, at least within the second or
third day of death.
Q Okay. But the second or third day of
death would not be unusual before these changes
would occur, is that correct?
A Before two days, they would be unusual.
Q Before two days it would be unusual to
see marbling or skin slippage?
A Correct.
Q So it would make sense, then, that there
was no skin slippage in this case even if she had

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been dead for more than two days, is that correct?
A Oh, no. Then I misunderstood you. For
skin slippage and marbling to have occurred, she
should have been dead at least over 36 to 48 hours.
Q Or --
A She has none of those indications.
Therefore the time of death is closer to 24 to 36
hours. That is the time that the body became limp.
Q Although skin slippage and marbling
don't usually occur for two or three days?

11 A Correct.
12 Q I would like to see Defense Exhibit
13 Number Five, if I may.
14 When did you have the benefit, Doctor, of
15 reviewing Defense Exhibit Number Five, the weather
16 report for the Baltimore area on the relevant dates?
17 A This morning.
18 Q You did have a chance to review it this
19 morning?
20 A Well, at least scan.
21 Q Okay. And what did it indicate to you
22 about the weather conditions on those days?
23 A It corroborated the impression of the
24 first I think, police officer at the scene and his
25 report that the day was cool and rainy, I believe,

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1 and that the temperature was consistent with
2 seasonal, in the 70's and 69 during the day and
3 going down in the day and going down to the 50's in
4 the nights.
5 Q And the water wouldn't affect the
6 temperature as it surrounds the body at all?
7 A Well, we know that because the deceased
8 is partially exposed to water and partially not
9 exposed to water and there's no differentiation
10 between one side of the body and the other.
11 Q Now, let me ask you this. With respect
12 to when rigor becomes established and full and when
13 it dissipates, your estimate of 12 hours in a
14 temperate climate, is that in accord with the
15 authorities in this area, with the written
16 treatises?

17 A Most books that you will read, and my
18 experience through many years is that, within 12
19 hours, both livor mortis and rigor mortis will be
20 pretty much established. And then from then, livor
21 stays the same and then gets mixed up with the green
22 discoloration of the body. Then you cannot
23 differentiate any more when the whole body becomes
24 green.
25 Rigor mortis, usually by 24 hours in

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1 temperate climates, the body's limp again. As I
2 said, sometimes it gets limp very early, at 16
3 hours.
4 Q Okay. And that's in accord with the
5 written authorities in this area with respect to
6 rigor?
7 A Yes. If you read most of the textbooks
8 that we use as the basic textbooks in forensic
9 pathology.
10 Q Okay. And the difference, therefore --
11 I'm back to your chart now. I'm dealing with rigor
12 and livor.
13 The difference between, it is your
14 testimony, a body's appearance at 36 hours is no
15 different in the future, from 36 to 40 to 44 to 48
16 to even 58, until the more advanced forms of
17 decomposition occur?
18 A Moderate first.
19 Q Moderate first?
20 A Advanced is when the kind of maggoted
21 activity begins to infest the body and eat it up.
22 Q Okay. If you can try to follow me. I

23 know I'm not using medical terms. But at 36 hours,
24 you testified rigor is gone. The body is limp?
25 A Right.

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1 Q And livor is fully out and will not
2 change or switch positions?
3 A Correct.
4 Q And from 36 hours into the future until
5 those more advanced forms of decomposition occur,
6 the body remains the same, limp and purplish on the
7 side that it was lying on?
8 A Moderate changes.
9 Q Okay. And the moderate changes you
10 testify occur within two to three days after death?
11 A We started describing moderate changes
12 by the end of the week.

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5 (Defendant's Exhibit Nos. 6 and 7, charts,
6 were entered in evidence.)

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[WITNESS: DR. ROBERT JOHNSON]
13 BY MR. SCHLAICH:
14 Q Dr, Johnson, you are presently employed
15 where?
16 A I am a Professor of Justice, Law and
17 Society at American University in Washington, D.C.

18 Q How long have you been a professor
19 there?
20 A I've been a professor there since 1977,
21 for 12 years,
22 Q Doctor, if would you, please, would you
23 recount for us your educational background?
24 A I have a Bachelors in Psychology from
25 Fairfield University in Connecticut. I have a

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1 Masters and a Ph.D. in criminal justice from the
2 State University of New York at Albany.
3 Q And do you have any training beyond the
4 Ph.D. level?
5 A I have received some six credits in
6 forensic sociology, which is the application of
7 social theory to problems of crime.
8 Q You have been engaged in research with
9 respect to criminals in confinement, is that
10 correct?
11 A Yes. Over the years, my main research
12 has been on adjustment to prison by inmates and also
13 by working in prison among the staff. Criminal
14 Justice is a field that is devoted to the study of
15 crime and punishment, and the areas I have focused
16 on are violent crime, life in prison, and the death
17 penalty.
18 Q And if you could, you've mentioned,
19 first of all, work in the institutions with the
20 staff. Could you tell us what work you've done
21 inside?
22 A Well; I've been asked by a number of
23 states and also by the City of New York to assist in

24 training correctional officers. I think the
25 understanding was that what we've learned about

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1 prison adjustment would be of interest to the staff
2 who have to manage the inmates and assist them in
3 their adjustment.
4 I've also done studies of officers and how
5 they do their jobs and how the stresses of prison
6 life affects them. Training sessions have been
7 offered to the staff to help them better cope with
8 the stresses of their work and to be more effective
9 as correctional officers rather than merely as
10 custodians.
11 Q And on approximately how many occasions
12 have you given those kinds of training sessions?
13 A I would say between 5 and 10 times over
14 the last 10 years. Usually, I'm invited in to lead
15 a day's worth of workshops on different aspects of
16 prison adjustment and I've been consulted a number
17 of times to help prepare programs, but not
18 necessarily to deliver them to the staff involved.
19 Q Could you tell us, it's my understanding
20 there's a specific theory of prisoner adjustment you
21 subscribe to, is that correct?
22 A Well, I think a fair way to say it is
23 that there's been a great deal of research done on
24 the adjustment of lifers -- that's a slang term used
25 on inmates who are given very, very long sentences,

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1 including a life sentence and even a true life

2 sentence. What we have learned is that the life
3 sentence prisoners, unlike --
4 Q Let me stop you for just a second. We
5 just want to talk about your approach to this type
6 of research. There's a social psychology approach
7 or something?
8 A Yes. The angle that I take on all the
9 problems I study is a social-psychological one,
10 which means I look at both the social and the
11 psychological forces, both the personal and the
12 environmental forces as they bear on the situation.
13 Q And on this subject of the adjustment of
14 lifers, in particular, what, if any, books have you
15 written?
16 A Well, I've written a number of books on
17 prison life. The first was entitled Culture and
18 Crisis in Confinement, which was published in 1976.
19 In that book, I studied the adjustment of prisoners
20 from different cultural backgrounds, primarily
21 black, Latin and white prisoners.
22 In 1981, I published a book entitled
23 Condemned to Die, which was a study of prisoners who
24 are sentenced to death and who are living on death
25 row under the death sentence.

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1 In 1982, I edited an anthology or a
2 collection of writings including my own and those of
3 others, called The Pains of Imprisonment, and the
4 focus of that book was on the stresses of prison
5 life and how they affect inmates as well as staff.
6 In 1987, I wrote, essentially, an original
7 text called Hard Time. Understanding and Reforming

the Prison is the subtitle. And that is my understanding as an expert in penology about what the nature of prisons are and about what, how they might be best used.
My most recent book is coming out in January. It's called Death Work. This is a study of an execution team which I worked with as a researcher for the last year or so, observing their training, and in two cases observing them carry out executions.
Q And have you written and published any other materials, that is articles or editorials?
A Yes. In academics you make a distinction in books where you have generally a main thesis, and between specific articles on very specific topics. I published about 25 or maybe 27 articles over the years, perhaps 10 or 15 chapters in other people's books, as well as some other

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technical reports that would only be available co people with a very narrow interest with a specific question.
Q Now, have there been any occasions in the past when you have been recognized as an expert in court?
A Yes. I believe over the years, I've been asked to testify about 10 times, and in those cases I've been recognized as an expert generally on a social-psychological view of either violence or prison adjustment or both.
Q Could you give us, could you tell us if you remember what court systems you have testified

in as an expert?
A Well, I have testified in this court system before as well as in Baltimore City and in other parts of Maryland. I've been involved in some cases having to do with suicides in jails in Los Angeles and Philadelphia. I testified on one occasion in federal court, the 5th Circuit, having to do with the effects of life on death row and whether or not that was a cruel and unusual punishment, and a few other specific topics.
MR. SCHLAICH: Your Honor, at this time I would offer Dr. Johnson as an expert in criminal

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justice with a speciality in social-psychological adjustment of people serving a life sentence.
MS. BROBST: No objection, Your Honor.
THE COURT: I'll accept him.
BY MR. SCHLAICH:
Q Now, Doctor, during the qualification, you were about to tell us your decision or your theory, that is, of the body of research on lifers and how they adjust in prison. Could you tell us that now, please?
A Yes. It's an interesting finding that lifers tend to be model prisoners, tend to be very well-adjusted prisoners. I think at first this is very surprising, but you have to recognize that from where the lifers sit, the prison has become their home. It's not a home they want to be in, it's not a home they're happy in, but it's home and a life they have to accept.
As a result, the lifers come to see their

interest, their self-interest as served by a
better-run, stable, clean, orderly, decent prison.
So as a result, not only will penologists, but also
prison officials will tell you that lifers tend to
be the more or less solid citizens of the prison
community. These are the people who care about the

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prison being clean. These are people who care
about the prison being orderly, about it being safe,
about it offering things to do during the day so
that one can get through one's life.
The implications is not that lifers find
this easy or pleasant, but the fact is they have to
work out some kind of an existence in prison and
this they try to do by taking advantage of those
opportunities for living that exist in prison.
So you will discover, for example, that
lifers, more than short termers, are likely to work,
likely to seek out a job in the prison, particularly
a job that offers some responsibility and maybe some
rewards. Lifers are more likely to sample programs,
to involve themselves in clubs inside a prison.
They are much more likely to try to
structure their day highly, to fill it with events
and activities. And the reason is that lifers don't
want to have to dwell on what they've left behind in
the outside because that hurts. They don't want to
dwell on the future, which is made up of nothing but
more prison days, because that hurts. So they
emphasize day-to-day life in the prison. And they
develop a life that has a kind of mechanical, almost
robotic quality to it. It's thin existence but

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it's an existence that does offer some dignity and
it's an existence that the prison officials find
serves their interest as well.
So you will discover -- I think this is
the most striking fact -- that if you look at rules
violations, consistently, across a wide range of
studies, lifers commit fewer rules violations than
short terms, significantly fewer.
Q Now, on that particular point, you
brought with you a display today, is that correct?
A Yes, I did.
Q Maybe if you'd step down, we can put
this up and you can explain to the jury.
A The simplest way to explain this is the
back bar would be the short termers and the checked
bar would be --
THE COURT: I don't think all the jurors
can see it that way. Why don't you move it up
closer or put it on that easel?
A This is a prison rules and infraction
chart. I'll hold it for you. Something that I
developed to help, to help summarize what the
research in this area would find. A number of
researchers have gone out and calculated the number
of rules violations that occur in prison.

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In any case, a number of people have gone
out to study rules violations. And what they
discovered was that short term inmates, whether they
are younger, under 22, in their twenties or 30, even

40, commit more violations, significantly more rules violations than do lifers. That's the first finding. So lifers, even early on, have fewer violations than do short termers.
Generally, as the prisoners age in prison, they mature, they become more settled. I think they come to realize that breaking rules in prison is self-defeating. As a consequence, you find that as inmates age, they commit fewer infractions. This aging effect or maturing effect is even more dramatic among lifers, is not at all uncommon. For lifers, 30, even 40 years, all of them at some point will be, tend to have less than one infraction a year.
I think the point to emphasize is not only is this a significant finding, it goes against common sense at first, because you think at first lifers have nothing to lose. But as I try to point out, they have everything to lose because prison is the only life they have. If they get moved out of their cell and moved in isolation, that hurts. That

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is their home.
Lifers tend to decorate their cells a little bit more, maybe not tastefully in my point of view. You take that them in, drop them in the hole -- he gets a job going. He's maybe respected by the staff. This is not uncommon. And he has some self-respect. This is not uncommon, either. And you rip him out and drop him in the hole, that's a terrific price.
So these offenders are very concerned

about maintaining that little world they develop there, and as a result don't violate many prison rules.
This is not to say they become reformed citizens. I think it's clearly a question of self-interest. But I think the self-interests there are dramatically evident. It is obvious that if you break rules in that setting, you're highly likely to be caught and highly likely to be punished; whatever routine you have going will be interrupted, and there's a high price to pay.
In addition to that, the routine that these lifers have established, and I mentioned earlier is highly structured, highly routinized, in a sense that routine offers the kind of external

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controls that their personalities didn't have formed in internal controls. So the prison life is simple enough and structured enough and controlled enough for them to be more in charge of themselves than they are outside. Not happier, because they would rather be elsewhere, but that's not a realistic option.
Q Thank you. You can return to the stand.
Doctor, if you know, where do people serving a life sentence in Maryland's prison system get sent to?
A The Maryland Penitentiary.
Q Are you familiar with that facility?
A Yes, I am familiar with it.
Q You have been in that facility?
A I have been in it a number of occasions,

17 recently interviewing prisoners, some of whom were
18 up for trial or retrial. And over the last two
19 years, in particular, I have made visits to the
20 penitentiary to interview staff of some inmates
21 whose cases I was involved in. And also I brought
22 my classes from the University to the penitentiary.
23 The penitentiary is very interested and willing to
24 give college students tours of the prison as well as
25 college professors, and they do open their doors

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1 quite graciously to people who have an interest in
2 the field.
3 Q Now, based on the information you've
4 gathered while working in the Maryland Penitentiary,
5 have you found that the same results you testified
6 to here today as a general rule apply in the
7 Maryland Penitentiary?
8 A Well, there's no reason to doubt that
9 they would apply. There's never been a specific
10 study of Maryland's infraction rights. But if you
11 talk with officials who know the longer term inmates
12 there, they don't have any reason to doubt this
13 finding.
14 There has never been a study, a systematic
15 study of American prison wardens on this point but
16 there is a study of other prison wardens in other
17 countries. And it's generally well-known both in
18 terms of lower, in terms of day-to-day talk that
19 goes on in prison as well as in terms of the body of
20 research, that the staff recognizes that the lifers
21 are even a stabilizing force in the prison because
22 of their interest in stability, order and so on.

23 Some of the studies that have been done
24 have dealt with the Maryland prisons and have the
25 same types of findings, but there has never been a

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1 specific study, Maryland study on infraction rates.
2 So a reasonable inference is that that penitentiary
3 like others would fit that model because we know
4 there's a great deal of stability in that finding.
5 The majority finding summarized in that chart is the
6 product of 10 or 15 independently-conducted,
7 empirical studies in a number of different states
8 and in one case, in a different country, Australia.
9 Q You also, during your testimony, have
10 referred to the body of research. That means, I
11 take it, there are more than just you researching
12 this particular point?
13 A Oh, right. Right. When I say a body of
14 research, what I mean is that there have been a
15 number of studies and a number of people who have
16 done both empirical studies of rules infractions as
17 well as interview studies of the adjustment of
18 inmates and I'm just one of that group of people.
19 Q Now, Doctor, there came a time when you
20 were called to review the Kevin Wiggins case, is
21 that correct?
22 A Yes.
23 Q And did you have a chance to meet Mr.
24 Wiggins?
25 A Yes, I did.

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Q And did you have a chance to review his jail records?
A Yes. I reviewed his jail records in some detail.
Q And from those records, you found that he had, in fact, violated some rules while held in the Detention Center, is that correct?
A Yes, I did.
Q Could you tell us what rules he was found adjudicated to have broken?
A Well, he had four adjudicated rules violations over his time in the jail and these had mostly to do with tension with officers, conflicts over how long telephone calls could go, or difficulty responding to orders from officers. Mr. Wiggins was described in those encounters as uncooperative, as making verbal threats, and as blustering quite a bit, and that does periodically happen early on in people's careers.
I think it's worth emphasizing that jails are not prisons. They're different kind of settings. Jails have a higher turnover, they're less stable settings.
The literature on lifers applies to people

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given life sentences and sent to prisons, which is where lifers go. We know from that body of research that people who had prior sentences that were shorter adjusted like other short term inmates and

short term inmates in general feel they don't have much to lose by defying staff or disobeying rules. So you tend to find that a person who is given life today but who in the past has had only jail experience or prison experience, they may have had some trouble in terms of rules violations and earlier confinements, but when they're given a life sentence, the psychology of the lifer as I described it to you takes over and they fall into this pattern of a decent prison adjustment.
Q Now, the four infractions that you noted cover a period of time that dates back to September of 1988, is that correct?
A Yes, that's right.
Q Okay. Now, Doctor, based on your speaking with Mr. Wiggins and your review of his records, do you have an opinion to a reasonable degree of certainty in your speciality as to whether Mr. Wiggins would adjust in prison under a sentence of life as you have testified lifers do generally?
A Yes, I do.

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Q What is that opinion?
A My opinion is that he would fit the generalization. Can I elaborate on that point?
Q Sure, please.
A Okay. This body of literature is a very strong one. More than 9 out 10 lifers fit this example. So people who go to prison under a life sentence and are troublemakers tend to be a very distant minority or very small minority. We frankly don't know how to predict who will be in that

group. But a reasonable person would presume that any person going to prison under a life sentence would fit that general category because the vast majority do.
Now, the reason I interviewed Mr. Wiggins, even though he wasn't doing a life sentence and therefore his adjustment wasn't immediately relevant, I nevertheless wanted to see if he showed some of the patterns of settling into jail life as you would expect a lifer when he gets to prison to show a settling-in pattern. And I believe that he did.
You mentioned, first of all, that there are four infractions. Two of them were very early on. And my examination of those incidents and my

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interviews with Mr. Wiggins led me to believe that his early experiences were very traumatic for him. He was depressed. He was very upset. He had never been in a jail before. He'd only been in a lock-up before. So I think the initial adjustment was extremely difficult.
He gradually began to settle in. Although he did have two incidents in June, none of those incidents involved violence.
In my discussions with Mr. Wiggins, he indicated that he felt that he was gradually learning to bend to the rules of the prison. When he first got there, he was rigid. He would defy authority because he didn't really understand what lifers come to understand, and that is that you must go along to get along in institutions, especially if

you're going to be there a long, long time. I think that that lesson is gradually, perhaps slowly being learned by Mr. Wiggins. So that would reinforce my general expectation that he would adjust decently to prison.
MR. SCHLAICH: Court's indulgence, please. No further questions, Your Honor.
THE COURT: Cross examine.
CROSS EXAMINATION

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BY MS. BROBST:
Q Thank you, Your Honor. First of all, I want to clarify. You're not here to try to tell this jury what would be an appropriate sentence in in this case, isn't that correct?
A No, I'm not to make the sentencing decision.
Q Okay. And you wouldn't even attempt to do so, isn't that also correct?
A That's correct.
Q Now, this theory of prison adjustment, whose theory is this, this theory that you espouse?
A The term "theory" is -- I think it's just a strong empirical finding that had been widely discussed in the penological literature.
Q Is it referred to as your theory in this circle of experts?
A Not specifically as my theory but I'm one of the people who is known to have made some contribution to this body of knowledge and who is competent to summarize it, which is what I tried to do here.

23 Q And is it a contrary theory that is
24 bandied about?
25 A No. At the moment there's none, and I

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1 think that reason there is none is the very strong
2 empirical basis for this finding. There is not a
3 competing body of studies that says lifers are
4 troublemakers, for example, if that's what you're
5 implying.
6 Q And who has done this research?
7 A Well, there would be a number of
8 people. Flannigan would be one. He has an article
9 in my anthology, The Pains of Imprisonment.
10 Hanstolk (phonetic) would be another. He has an
11 article also in my anthology. John Conrad. There's
12 a pretty wide range of people.
13 Q Are these people associated with the
14 University as a rule?
15 A Some of them are. So those names I did
16 mention to you are researchers. That's true. Some
17 of them did research, though, when they were members
18 of the Department of Correction, such as Conrad.
19 Departments of Corrections do have
20 research arms and some of them are staffed by
21 academics. Some academics go into those departments
22 for a while and go back to academia and some do the
23 reverse. They start in academia and go to the
24 departments and stay there.
25 So it's a pretty good range of different

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1 kinds of people doing the studies.
2 Q And you consider yourself, correct me if
3 I'm wrong, an expert in penology?
4 A Penology is certainly a recognized term
5 for prison, certainly.
6 Q And are degrees offered in any
7 recognized university in penology?
8 A Degrees are offered in criminal justice
9 or criminology, and then within that area you focus
10 on one aspect of the criminal justice system. At
11 the State University of New York at Albany, for
12 example, somebody might have gotten a Ph.D. in
13 criminal justice generally and then developed a
14 specialized interest in the prison systems or
15 specialized interest in the specialization of the
16 courts.
17 Q Now, you testified that you have
18 testified in a number of courts in this and other
19 areas. It's true also, however, that you've never
20 testified in court for the State, isn't that
21 correct?
22 A Well, I've never been asked and I would
23 be happy to.
24 Q And you've testified approximately 10
25 times, is that what you said?

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1 A Yes, I think that's right.
2 Q And personally, your personal views on
3 the death penalty are that you're opposed to the
4 death penalty, isn't that true?

A Yes, I'm personally opposed to it but I certainly recognize that reasonable people can differ with me on that.
Q Now, these incidents, these four adjudicated infractions that you've referred to in your direct, you don't consider four to be a lot in a 13 month period?
A Well, if it were a person doing a long term prison sentence, it would be unless it were very early on. Even then it might be a bit high, I think what point I tried to emphasize was that we know that before people get life sentences, they may have a different way of adjusting either to jail or to a short term prison sentence. It's well-known, for example, that an inmate who might have a two to five year sentence could have a whole lot of trouble in prison and be a troublemaking inmate. If he comes back on a sentence of life or natural life, the odds are very much that his adjustment will be much better for the reasons I've indicated.
Q So the answer is no?

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A Well, the answer is that it's hard to know for sure what exactly those jail infractions portend for prison life. Four infractions is not outrageous. None of the activities were overtly violent. There was no indication of his adjustment getting worse over time, becoming more unstable or more problematic.
So I think that it was, it's reasonable to infer that he's beginning to adjust better to confinement and this process will probably continue

and accelerate if he were given a life sentence.
Q Okay. So four is not a lot, in your opinion?
A Right.
Q Now, when you spoke to Mr. Wiggins, I assume you introduced yourself and told him why you were there?
A Yes, that's right.
Q So when he discussed with you his chance to act as a model prisoner in the future, he understood that you were there to testify as a defense expert?
A Well, he knew I was a defense expert but he didn't know what my expertise was. I simply introduced myself as somebody who is an expert on

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prison adjustment and I'd like to know how you're adjusting here.
Q And he said fine?
A No, he talked about problems he had. I mean, he had been very depressed when he first arrived. He had been very upset. He's had some problems with the staff and these are very upsetting to him. So no, he didn't say "just fine."
Q But you have been able to conclude, nonetheless, that he would adjust in the future?
A Well, as I indicated, he did describe the fact that he's settling in a little better. He's not getting into as much trouble. He's not as rigid.
I think there was a recognition on his part that early on, he refused to bend over small

17 things and petty problems grew up into infractions
18 and this was self-defeating. So I think he's
19 beginning to recognize that. And he communicated
20 that to me.
21 Q And you feel that he's beginning to
22 recognize that because that is what he communicated
23 to you, right?
24 A It's a sensible, it's a very plausible
25 picture of his adjustment given both the official

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1 record and his description of the incidents, yes.
2 Q Okay. Now, obviously, from your very
3 study, there are indications that some people
4 certainly -- first, let n clarify your definition
5 for a moment.
6 What did you consider to be a lifer? Did
7 you include any long term sentence?
8 A Long term, lifers and long termers are a
9 group that generally is considered to be people who
10 are serving 10 or more years. In other words, the
11 minimum term would be 10 or more years.
12 I know, in that group, you've got some
13 people who serve natural life, which means life
14 without parole. That's a group that does have a
15 slightly higher infraction rate than the lifers who
16 have the hope of parole. But even so, the natural
17 life sentence prisoners, what is sometimes called
18 true life sentence prisoners, who have no reasonable
19 hope of release, have significantly fewer
20 infractions than short termers. So they, too, have
21 somehow come to accept the reality of an entire life
22 in prison and worked out a reasonably decent

23 adjustment that is not a danger to others in the
24 community or a problem for others in the prison
25 community.

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1 Q Okay. But in your boxes --
2 A Yes.
3 Q -- you have included, have you not,
4 everyone who has received a sentence of over 10
5 years, so they're clumped in with the true lifers
6 and the natural lifers?
7 A Yes. That's a general, that is a
8 general trend. It's an attempt to give the general
9 picture and that's an accurate general picture.
10 Q Okay. Now, it is true, therefore, that
11 some of these people do have acts of violence while
12 incarcerated and do not adjust?
13 A Well, some certainly do, that's right.
14 As I said, over 9 out of 10 fit that pattern based
15 on the statistics that I am familiar with and the
16 studies that I know of. Therefore, some don't.
17 If we could predict who they were, we
18 would. We're not able to predict who they are. I
19 think, though, it is some comfort to know that if
20 you'd study homicide in prison, you'd discover that
21 the people who commit the homicides in prison are
22 not the long termers, they're the shorter term
23 inmates who then become long termers and typically
24 develop more stable adjustments.
25 Now, of course, if you commit a violent

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crime in prison, you're likely to be segregated a long time in prison and then closely monitored. But the population of people who do that are not the lifers and long termers, they're not the ones who commit the violence, that the staff fears or other inmates fear.
Q Okay. Now, a short term prisoner, upon committing a violent act while incarcerated, could be punished by receiving a consecutive sentence, isn't that true?
A Yes, he could.
Q A person who is serving life in prison, could not receive a consecutive sentence, isn't that true?
A Well, it would depend on the jurisdiction. I would imagine you could be given a true life sentence and in jurisdictions with the death penalty you become eligible for the death penalty if the crime were a murder.
Q Okay. But there comes a point in time when someone cannot receive more time than they have, is that not true?
A Well, yes. Logically.
Q And isn't it also just logical that, therefore, you cannot be punished for that and are

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less likely to follow the rules?
Q Well, as I indicated, the vast majority of people who serve these long terms are not a problem. And secondly, if you have a long termer or

any other inmate who is a problem, the prison system doesn't typically prosecute them as a first resort. What they typically do is manage them with a more restrictive environment.
So for example, if you had any given inmates who is a problem inmate, you have segregated quarters you can put them in. You can put them in other kinds of grades that further limit their movements. So there are custodial options.
You must recognize that there are many states that don't have the death penalties and they have prison and they manage those prisons and they manage them, in many cases, quite well without the threats of a death penalty. What that implies is that people don't only comport their conduct to rules because of the death penalty; they have other motivations. Most of those termers are carving out as decent an existence as they can and it is the fear of losing what little they have, what little they have in the prison community that keeps them in line, rather than the fear of a distant sanction

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like the death penalty.
Q All right. Are you saying that if someone violently assaults or kills another inmate or guard in jail and they are serving a life sentence, they are not normally prosecuted?
Q No, no. I'm not saying that.
Q Okay.
A What I am saying is if you have an inmate who is a problem, you know, who gets into a lot of fights or breaks a lot of rules or is a

troublemaker, makes a lots of threats, makes the
place unpleasant, you can isolate them. And we do
have facilities in all major prisons for the further
isolation of inmates.
Q And are you suggesting, therefore, that
it is not an incentive to someone to not commit a
violent crime because they may go to jail for more
time?
A I think the threat of that will deter
some people. But the vast majority who are in there
doing time are, work out their own way of prison
living and it is the relative benefits of that life
that keep them in line rather than the fear of
further sanctions.
Q Isn't it true, Doctor, that there's a

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certain hierarchy in prison among the prisoners, a
certain pecking order?
A Yes. There is.
Q And aren't lifers usually at the top of
that pecking order?
A Not necessarily. You can't predict the
pecking order strictly by offenses. For example,
you would assume that murderers would have the
highest statue. Well, some murderers do. Some
don't. It depends on how the person carries himself
in the prison.
Armed robbers are often thought of as more
daring than a typical murderer because of the more
sort of wildless character to the crime. Let me
give you an example.
There have been studies of inmates who

have been victimized by other inmates, and there was
a study done of which inmates became rape victims of
other inmates. And what was discovered was that
murderers were as likely as any other group of
inmates to be subjected to sexual violence. So the
fact of their violent crime and their presumably
long sentence didn't put them at the top of the
pecking order.
Prison is a very small community and you

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get your social status based in large measure on how
you carry yourself in that community and how you
handle the pressures of prison living, which can be
quite substantial.
Q Well, you would agree, would you not,
that it is a violent society?
A There is violence in the prison but
prisons are fairly disciplined and structured places
and you can avoid that violence if you want to. For
example, you can carve out a life where you spend a
great deal of time at work in prison. You can spend
a great deal of time in programs. You can avoid
places like the yard and the mess hall or spend
relatively little time there.
Prisons are violent, but just as in the
free world, much of the violence occurs between
people who share violent values and who get
themselves involved in illicit or illegal
activities. Most of the lifers avoid those areas
and those problems because they meet trouble and
trouble underlines what little they have in that
prison life.

23 Q So toughness does not count in this
24 society?
25 A Well, the toughness is not the same

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1 thing as what you were just saying. That you seem
2 tough or you carry yourself well is not the same
3 thing as getting into violent infractions. One of
4 the ways you keep people away from you in prisons to
5 be judicious about where you go. Another way is to
6 look cool and mean and tough wherever you do go so
7 people don't think you're an easy pushover.
8 But it you get yourself involved in a lot
9 of activities in the prison yard, there is more
10 likelihood of trouble because those are the kind of
11 places in which trouble, including violence, take
12 place. So if you're going to move in those circles,
13 you're got to run the risk of trouble. And lifers,
14 tremendously so, the vast majority try very hard to
15 avoid that trouble.
16 Lifers tend to see these people in the
17 yard playing those violent games as impetuous
18 tourists who make their prison less livable and they
19 don't want much to do with them.
20 Q Now, as I understood your testimony on
21 direct and during some of my questions on cross
22 examination, you do agree that you cannot predict
23 which of these people are going to become well
24 adjusted model prisoners and which are not?
25 A Well, let me say this. I know the vast

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1 majority there simply because that's what the
2 findings are. I cannot predict who that minority
3 will be, that is correct.
4 Q And you cannot predict that this
5 defendant will be in that majority, is that correct?
6 A I certainly cannot give you 100%
7 assurance, that's correct.
8 Q Now, what you're talking about is, when
9 you talk about people follow the rules because they
10 know they'll be punished and this is their life and
11 they have to make the best of it, you're talking
12 about goal-oriented behavior, are you not?
13 A Yes.
14 Q You're talking about people who consider
15 their actions, who consider their actions before
16 they act because it may result in some punishment?
17 A Yes.
18 Q So a sudden flare-up of violence or
19 temper, a stream of passion as it were, would not
20 fall at all into this theory which you have just
21 espoused to the jury, is that correct?
22 A No, because, see, you have to look at
23 people in context. It's very obvious that people
24 who become lifers are less impulse-ridden. Lifers
25 in the outside world, they're not very much in

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1 control of themselves. Prison is a much more
2 controlled setting. The punishment and rewards are
3 much more obvious. The life is more manageable.
4 And I think what you discover is that they carve out

an existence that is Spartan but fairly clear-cut and they live from day to day. They kind of shelter themselves from those larger pressures and constraints and temptations that in the outside world they get themselves caught up in, which lead to trouble.
Q Okay.
A If you expected impulsive, violent offenders to be as impulsive and violent in prison as they are outside you wouldn't have prisons you could run. You'd have daily riots. You'd have bodies piled up in the yard. But you don't.
Q But you do agree that not life as you've define it, which is people serving a sentence of greater than 10 years, but true lifers are people who have committed a violent act on the outside?
A All of the people who get l0 or more years or the vast majority of them have committed violent crimes of one sort or another. The emphasis in this literature is on lifers, but long termers are included and they are startlng at a minimum of

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-- at this point, I think it would be misleading to dwell on the 10. I think that's just the bottom end. The mean time served would probably be closer to 20 or 22 years.
But I mean, true lifers who certainly have committed highly violent crimes and have no reasonable expectation of parole still commit infractions at significantly lower rates than short termers.
Q Now, did you sift out your fractions

here? I mean, when you list the number of infractions, do you include things as coming to dinner late as well as carrying a shiv or assaultive behavior?
A That's simply a summary chart. That's simply a summary chart. That's correct. Now, in the literature you will find that people have also argued that the types of offenses tend to be very similar. But the times of offenses tend to be the same.
Now, it's a striking finding, for example, that the kind of violence we fear is not common among lifers, so you wouldn't find lots of violence inside the prison committed by those offenders. So what offenses they do commit don't tend to be

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violent.
Secondly, they don't tend to be escape-related. Only one-tenth of 1% of all the infractions of lifers are related to seeking escape from prison. I think that has to do with the fact that they're doing time in maximum security and opportunities for escape are very few.
Q But it has occurred?
A There have been certainly some escapes from prison by lifers. There have also been escapes from prison from death row. So there's the possibility of escape in any case. But the number of escapes from maximum security prisons in this country is very, very small.
The number of escapes that have been followed by violent crimes is almost infinitesimal.

17 It's a very tiny group.
18 Q Okay. But can you give us any numbers
19 -- and this is a chart. It shows us per person.
20 But how many people actually serving a life sentence
21 for this violent crime -- what prison --
22 A That is the summary chart summarizing a
23 whole body of research, not specific to any one
24 person.
25 Q All maximum security?

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1 A Yes,
2 Q Only maximum security?
3 A Yes.
4 Q Did all the prisons who were used carry
5 people who are serving sentences for first degree
6 murder?
7 A Certainly.
8 Q They did?
9 A Yes.
10 Q Now, if you were either, say, as a part
11 of a study, you were going to spend time in prison,
12 you weren't going to be treated any differently from
13 anyone else, you were just going to share a cell
14 with somebody in prison -- who would you prefer --
15 someone serving two years for tax evasion or a
16 convicted murderer who is serving a life sentence?
17 Who would you prefer to share a cell with?
18 A Well, you know, you have to answer that
19 question emotionally and in terms of one's
20 knowledge. I mean, I'm not afraid of tax evaders
21 generally. I don't see any reason to be concerned
22 about that. Like anyone else, you would be uneasy

23 about walking into prison and sharing a cell with a
24 convicted murderer under those conditions.
25 If you want to take your hypothetical a

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1 bit further, let me see the man's record, if he fits
2 into this fairly typical pattern, then I could
3 assume we could co-exist. But I would be uneasy
4 walking into any prisoner, like anybody, including
5 murderers.
6 When you're sentenced to prison, I don't
7 think you should have the impression that we're all
8 sent to prison, cool, calm and collected. It's a
9 very traumatic, depressing thing. A person may well
10 deserve this. I won't argue that point. Whether
11 they deserve it or not, let's put it aside for a
12 moment.
13 These are people with doubts and fears of
14 their own, going to prison with a lot of people,
15 many of whom have adjusted to prison life badly.
16 They're going to have deprivation. They're going to
17 have to be told what to do by fellow adults day in
18 and out. They're going to have to, if they're
19 lucky, work out a fairly monotonous existence along
20 the lines I described. That's a grim prospect for
21 anyone.
22 Q Well, if, Doctor, you chose the
23 convicted murderer and he started blustering, would
24 that cause you concern?
25 A Absolutely, like anybody else, and I

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1 would try to respond to it.
2 Q But the hypothetical like that is hard for
3 me to respond to because, in my research, of course,
4 I come in contact with people who fit this
5 characterization. I've also interviewed people
6 condemned to die moments before their execution.
7 And certainly they have reasons to be desperate at
8 that point, and I'm well aware of that.
9 It's hard to know in any specific case
10 what one would do. But I think that we don't
11 normally sample other prisoners and say, we're
12 sending you to the penitentiary; do you mind if we
13 room you with a murderer doing life? I think we
14 simply argue that any felon who goes to the
15 penitentiary takes what he gets and we don't usually
16 weep for them. So I don't even think that's a
17 reasonable hypothetical.
18 When people go to the penitentiary they go
19 there because they committed serious crimes. And
20 together, they have to work out a kind of existence.
21 The long termers will not be a special threat. As a
22 group, they will not be a special danger to
23 themselves or others.
24 So if anything, we could at least say with
25 some confidence that we would expect the lifers to

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1 make the prison more stable, not less, as a fair
2 generalization.
3 Q So who would you pick?
4 A Well, who would you pick?

5 Q I don't have any further questions, Your
6 Honor.
7 THE COURT: Re-direct.
8 RE-DIRECT EXAMINATION
9 BY MR. SCHLAICH:
10 Q Just a couple. Doctor, when the State's
11 Attorney was asking you about your charts and she
12 brought out the fact that people serving a sentence
13 of 10 years and up are on here, you said that the
14 mean time being served, indicated in that chart, was
15 20 to 22 years. What is mean time?
16 A Oh, the average. In other words, the
17 average offender that would be in these studies is
18 probably serving 20 to 22 years. I think nowadays
19 in Maryland, it's probably 25 for a life sentence.
20 That would be the average. Of course, you have a
21 true life sentence in Maryland: that means for as
22 long as the person lives in prison.
23 Q One other thing. The State's Attorney,
24 during cross examination, brought out that one
25 punishment for a person serving a long sentence,

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1 that is, that commits a violent offense in prison,
2 would be to segregate and restrict them even more,
3 correct?
4 A Yes.
5 Q And in fact, Maryland has just completed
6 and opened an institution designed to do just that,
7 is that right?
8 A Yes, it has.
9 Q What is that institution?
10 A This is the -- well, it's informally

known as the Super Max institution that exists next to the penitentiary.
There is another point that I think is worth stressing in this context and that is that Maryland, as a state, is unique in that condemned prisoners are held in the regular prison population. So if any given prisoner is sentenced to life or death, they still go to the Maryland Pen and they go to a regular cell block. The cell block they go to is called Death Row, but they leave that cell block and mingle in the prison population just like any other maximum security prisoner.
The prison officials have concluded that that's a workable arrangement; that in their view that is a custodial, workable and livable

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arrangement. So they would conclude that they can, in fact, manage both condemned prisoners and long term prisoners within the confines of the penitentiary.

* * * *

MR. SCHLAICH: Your Honor, I have a Law Review article that we would like to introduce to the jury from the Stanford Law Review, Volume 40,

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Number 21 November of 1987, entitled Miscarriages of Justice in Potentially Capital Cases. And I have a copy of that article in its entirety and I have provided the State with a copy and I would ask to have it marked and introduced on my motion to

present this to the jury.
And I believe, Your Honor, that the State has some objection to that.
MS. COFFIN: That is correct, Your Honor. The basis of the objection, one, hearsay; two, this type of evidence is no more than what was attempted previously to put in evidence of other types of cases. It has no relevance to this defendant, this case or this sentencing procedure. For those reasons, it would not be admissible.
THE COURT: Mr. Schlaich, can you tell me under what authority this should come in?
MR. SCHLAICH: Your Honor, the authority for this is that, first of all, it's a recognized work from a legal, scholarly journal which this Court does have authority to allow into evidence and to allow to be considered.
THE COURT: Under what authority? Can I just put in an article without giving the other party an opportunity to cross examine?

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MR. SCHLAICH: It's a statistical study, Your Honor, that shows both the positives and the negatives of the way the research was done. It's all explained within the article. So it has both the good and the bad about it explained in there. Therefore, I would say that on sentencing, it's not something that would be --
THE COURT: It is an article that is without an opposing view anywhere?
MR. SCHLAICH: It's an article that is -- subject of the article is that these professors of

12 law have examined cases since the early 1900's
13 through to more current times and have tried to call
14 out a group of cases where they feel a person
15 received a sentence of death and in fact may have
16 been found guilty in error. The article explains
17 how they arrived at that group of cases, explains
18 the shortcomings of that type of judgment about any
19 particular case, and explains why, when each case
20 they chose to include, they did decide to include
21 it.
22 Of course, there could be any number of
23 thousands of cases, obviously, where death was
24 proposed and the guilty verdict was, in fact,
25 correct. If I remember correctly, Your Honor,

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1 there's only 109 cases that they pull out that they
2 felt met their criteria for inclusion in the study
3 as cases where the original guilty verdict was
4 incorrect.
5 THE COURT: The State's objection is
6 sustained. It is hearsay. It deprives the State of
7 the opportunity to cross examine the authors. It is
8 not a work that is unopposed. It's an
9 interpretation and evaluation by its authors.
10 Therefore the objection is sustained.
11 MR. SCHLAICH: Your Honor, I would just
12 note an exception to that. I think that under
13 Lockett and Ettings and also the Doering ruling in
14 Maryland, that that type of information should be
15 admissible. And could I ask, for the record, what
16 it was marked as?
17 THE COURT: Defendant's 8.

18 MR. SCHLAICH: Defendant's 8.
19 THE COURT: Doering says that an article
20 like this can come in?
21 MR. SCHLAICH: I think the principle of
22 Doering, Your Honor, is that anything the jury might
23 consider to be in any way mitigating to the
24 punishment they're being asked to inflict, they
25 should be allowed to consider.

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1 THE COURT: Okay.
2 MR. SCHLAICH: Your Honor, also at this
3 time I would ask the Court the question we have
4 presented in pre-sentencing motions, the idea that
5 we would be allowed to present to the jury the
6 explanation of the plea bargain that was offered to
7 the defendant. And the question to the Court is,
8 have you, in any way, reconsidered your ruling that
9 we could not do so?
10 THE COURT: Are you asking whether I've
11 been thinking about it?
12 MR. SCHLAICH: Well, Your Honor, the
13 question is --
14 THE COURT: I've been thinking about a lot
15 of things, Mr. Schlaich. But do you mean will I
16 permit you to present to the jury the fact that the
17 State had made a plea offer which was rejected?
18 MR. SCHLAICH: Yes, Your Honor, under the
19 terms of the proffer that was made during the
20 motions on what that plea was; the reason being --
21 THE COURT: Quite frankly, I would like
22 the jury to know that but I'm not going to change my
23 ruling. I don't think it's correct legally for me

to permit it.
MR. SCHLAICH: I understand, Your Honor.

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I would just note that we would have at this time tried to present that to the jury.
THE COURT: Yes.
MR. SCHLAICH: The other thing, Your Honor, is that during motions, we asked the Court's permission on our motion to permit evidence of other first degree murderers who did not receive a sentence of death, to present to the jury the transcript of the case of State v. James E. Malone. And during that motion I proffered to the Court what that transcript would contain. Apologized to the Court at that time because I did not have it with me.
I would ask at this time that the actual transcript be marked as a Defense Exhibit, first on that motion, and introduced as such on the motion.
Then, Your Honor, I would ask, again, the Court's permission to present this item to the jury now during the sentencing proceeding.
THE COURT: State wish to respond?
MS. BROBST: We're opposed to this introduction for the reasons previously stated. Your Honor. The introduction of something like that in a vacuum is misleading to the jury who doesn't know the reasons for the decision to have the case

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proceed in that manner.

Additionally, as the Court previously pointed out, the State would then argue that it be allowed to introduce a case which we would argue was similar, in which the death penalty was received by a defendant. A number of considerations go into a case like that, not one of which is the feelings of the family of the victim. And certainly you just can't retry every case that the State has ever sought the death penalty in, in every death penalty case.
THE COURT: Is there anything else you want to put on the record?
MR. SCHLAICH: Nothing I want to add. All our grounds were stated on argument on the motion.
THE COURT: Again, I do not believe that this is relevant to the sentencing of this defendant. The courts have instructed the trial courts to make sure that evidence and information that is relevant to the sentencing of this defendant is certainly admissible. As the State points out, how again can this be treated by the State? Does the State have an opportunity to put in an opposing case for their consideration, so that there can be a weighing of whether this case here of Mr. Wiggins is

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more like the one that you offer or more like the one the State offers? Your request is denied again.
MR. SCHLAICH: Your Honor, for the record, could you tell me the number of that?
THE COURT: That is, for identification, Defendant's Nine.
MR. SCHLAICH: Thank you, Your Honor.

8 Lastly, Your Honor, it's my belief that
9 Mr. Wiggins will choose to exercise his right to
10 allocute to the jury and will choose not to testify
11 from the witness stand. The reason I'm bringing
12 this up at this point is because it's also my
13 belief, Your Honor, that Mr. Wiggins, in his
14 statement to the jury, which he has been thinking
15 about, would disclose to the jury that he was
16 offered a plea agreement and would disclose to the
17 jury what the terms of that agreement were as he
18 understood them to be. And I think Your Honor, that
19 given your ruling on our efforts to do that in
20 evidence during the direct part of the defense case,
21 we need some guidance from the Court as to whether
22 the Court will allow Mr. Wiggins to do that during
23 his allocution.
24 THE COURT: Ms. Brobst?
25 MS. BROBST: Your Honor, we'd object. Not

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1 only are we not only unable to refute any of that
2 evidence, which we could if it were introduced in
3 the defense case, because we're not even entitled to
4 cross examine the defendant who allocutes.
5 THE COURT: Anything else, Mr. Schlaich?
6 MR. SCHLAICH: No, Your Honor.
7 THE COURT: The allocution by the
8 defendant is considered evidence in the case for the
9 purposes of the jury determining what the sentence
10 ought to be, although that evidence is not given
11 under, it's not testimony given under oath. It's
12 still considered as evidence in the case by the
13 jury, to help make their determination.

14 To permit the defendant to tell the jury
15 that there was a plea bargain offered which he
16 denied or rejected is the kind of evidence that the
17 State ought to have had an opportunity to rebut.
18 But if I don't let it in in the first place for the
19 reasons that I stated on the motion in limine
20 hearing, I certainly shouldn't let it in in the form
21 that is proposed, that is during the allocution by
22 the defendant.
23 He's instructed not to refer to the plea
24 bargain.
25 MR. SCHLAICH: I will so instruct my

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1 client, Your Honor.
2 THE COURT: is there anything else?
3 MS. BROHST: No, Your Honor.
4 MR. SCHLAICH: Court's indulgence a
5 moment.
6 Your Honor, the last thing to bring up is,
7 in fact, when Mr. Wiggins would be allowed to
8 allocute. He, I am led to believe, has been writing
9 his statement out so that he covers the things he
10 desires to and will also have to, of course, now
11 edit what I'm told that statement is to reflect, the
12 Court's instructions on the plea.
13 Therefore, Your Honor, we would ask that
14 he be allowed to do that tomorrow morning as opposed
15 to this afternoon to give us some time to meet with
16 him.
17 THE COURT: Not likely that he's going to
18 allocute this afternoon, anyway. Is it? Hadn't we
19 determined yesterday that -- are you going to be

20 finished now?
21 MR. SCHLAICH: We'll be finished now, yes.
22 THE COURT: Oh, I thought you said you had
23 another witness coming.
24 MR. SCHLAICH: Your Honor, what we have is
25 that, because of the Court's ruling denying

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1 bifurcation of the sentencing phase of this hearing,
2 and based on our argument that to present evidence
3 of Mr. Wiggins' psychological profile during a
4 non-bifurcated proceeding would prejudice the jury's
5 decision as to whether Mr. Wiggins was the principal
6 in the first degree in this offense, we feel that we
7 are prejudiced in such a way that we are precluded
8 from presenting our last witness, who would be,
9 would have been Dr. William /STERB letter. And
10 therefore, we would not be offering him to the jury
11 live.
12 We would like to put on a proffer as to
13 what his evidence would have been. I don't think I
14 brought it with me because I was planning more on
15 this afternoon doing that.

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3 MR. SCHLAICH: Your Honor there are two
4 other things I need to do out of the jury's
5 presence. First of all, I forgot one other piece of
6 evidence that was ruled on on motions. That was the
7 proportionality study, which on our motion on
8 proportionality, was labeled Defense Exhibit l-A, B
9 and C. Your Honor, we would wish to introduce that

10 evidence to the jury at this point in time, although
11 we understand that your ruling is that we cannot do
12 that. Is that correct?
13 THE COURT: Does the State wish to be
14 heard?
15 MS. BROBST: No, Your Honor. We'll submit
16 on the previous argument.
17 THE COURT: Your request is denied.
18 MR. SCHLAICH: Yes, sir. The other thing
19 is, Your Honor, I said to the Court that we had
20 decided, based on your ruling denying bifurcation,
21 that the potential prejudice to our client by
22 putting, potential prejudice, to the issue of
23 whether our client is the principal in the first
24 degree would be severe if we put on the psychologist
25 we have, Dr. Stejskal. I would, at this time,

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1 proffer that Dr. Stejskal would have testified to.
2 Your Honor, Dr. Stejskal saw the defendant
3 at the Detention Center on two occasions. He did
4 numerous psychological tests. The results of those
5 teats would be as follows:
6 That Mr. Wiggins is very childlike, that
7 he shows a lack of intellectual development, that he
8 feels impotent, meaning that he feels ineffective
9 and overmatched by life.
10 His reading scale is on a 5th grade
11 level. His math scale is on a 7th grade level. He
12 has a full scale IQ of 79, which puts him in the
13 bottom 8% of his age.
14 He did very low on tests that indicate
15 emotional deprivation and lack of use of reading

skills, meaning that those are two things he's very weak in by that low score.
The doctor would testify that an IQ of 79 impairs a person's function in every aspect of daily life that requires problem solving, that it makes those people poor social judges of other people, that it makes people poor judges of decisionmaking in general, that it makes them anxious and confused in demanding situations but, however, at an IQ level of 79, you are bright enough to know that you do

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more poorly at problem solving than others do and therefore that makes you emotionally vulnerable to what you expect to be an oncoming attack.
He suffers from no brain damage. The doctor will testify that he scored low on the antisocial scale, that he's not impulse ridden, that he is not narcissistic; however, the defendant, the defendant's tests results indicate that he is the type of person who will occasionally take what he thinks he is entitled to.
Furthermore, Your Honor, the results would indicate that he has difficulty coping, but those difficulties are not due to any presence of a psychotic disorder. He's not self-centered or narcissistic. He's aware of his limits. He's interested in other people. He has some capacity for empathy with other people. He wants to function in the world.
The doctor found him to be void of what he classifies as the malignant fluff, which means he sees no aggressive pattern in his behavior and no

acted-out hostility. However, he would note that Mr. Wiggins is full of bluster and likes to mouth off and did, in fact, engage in a session of that with the doctor.

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He would furthermore state that he feels that he would adapt to prison. However, he will be a very verbal and loud-mouthed prisoner for some time but not physically aggressive.
He would state that it is his opinion that the defendant currently has a psychiatric/psychological diagnosis of personality disorder NOS, which means not of specific type, and that it has features of borderline paranoid personality. And that is our proffer of his testimony, Your Honor.
THE COURT: And you understand that I'm not barring you from offering that testimony but it's in your judgment from a trial strategy that it would be prejudicial to the defendant because of the denial to bifurcate the proceeding; is that correctly stated?
MR. SCHLAICH: Exactly, Your Honor. I understand you're not barring it but that's a correct restatement of our position on it, Your Honor.
THE COURT: Okay.
MR. SCHLAICH: That's all we have, Your Honor. The pictures that the State and defense talked about during Sergeant O'Neill's testimony, we

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have them and we would put those into evidence when the jury comes in.
MS. BROBST: No objection.
MR. SCHLAICH: I think the only thing left is Mr. Wiggins' election to testify or not.
THE COURT: Are you both sure you have into evidence everything you want in?
MS. BROBST: State's satisfied, Your Honor.
MS. NETHERCOTT: Hesitate to answer that. But yes, I believe that's it.
THE COURT: Okay.
MR. SCHLAICH: That is considering the Court's rulings on the various items we've attempted to enter.
THE COURT: Okay.
MS. NETHERCOTT: Your Honor, if the Court will allow at this time, I will go over with Mr. Wiggins his right to testify.
Kevin will you stand up, please? Kevin, we've been talking about this.
As you know, you have a right in this proceeding to take the witness stand and testify. That is your right and that is your decision. In the event that you elect to take the witness stand

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and testify, you will be subject to cross examination by the State's Attorney. You also, in this proceeding, because it's a death penalty proceeding, you have what is called a right of

allocution. That means that you will be given an opportunity to address the jury without taking the witness stand. That's not affected by the decision you make regarding testimony.
If you elect to allocute, under Maryland law, the prosecutor is free to comment on the fact that you did not take the witness stand. Anything else the Court would like me to cover with regard to the waiver?
THE COURT: is that the extent of the waiver that you intend to give to him?
MR. SCHLAICH: Excuse me.
MS. NETHERCOTT: Well, also, Kevin, if you do take the witness stand, you must answer any question that's asked of you. If it is a question the judge rules is a permissible question, you would have to answer.
THE DEFENDANT: Okay.
MS. NETHERCOTT: Now, do you understand these rights?
THE DEFENDANT: Yeah.

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THE COURT: Is it my understanding that there are no prior conviction which the State may use against him? Is that correct?
MS. BROBST: That's correct, Your Honor.
THE COURT: Do you understand that, that if you decided to testify, they couldn't bring up any prior criminal convictions?
THE DEFENDANT: Right. I understand that. But let me just say something. I mean, everybody doing every damn -- think I have one

11 right to say one thing. I don't have anything to
12 hide, okay. And I don't care what anybody thinks,
13 all right. I know that I didn't kill, but -- can I
14 explain to him why? Okay.
15 THE COURT: Well, the record should
16 reflect that after speaking with counsel, he decided
17 not to say anything further at this time, so it
18 doesn't appear that the Court is preventing him from
19 speaking.
20 MS. NETHERCOTT: Yes, Your Honor, the
21 record should so reflect.
22 THE COURT: Go ahead with your advisement
23 or, if you're finished that --
24 MS. NETHERCOTT: I think I'm finished it
25 unless the Court has anything else.

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1 Have you had a chance to discuss this with
2 both Carl and myself?
3 THE DEFENDANT: Yeah, I have had a chance.
4 MS. NETHERCOTT: And have you made a
5 decision?
6 THE DEFENDANT: Yeah, I made a decision
7 based on --
8 MS. NETHERCOTT: And what is the
9 decision?
10 THE DEFENDANT: I don't, I don't think I
11 can say anything that have any --
12 MS. NETHERCOTT: Well, just are you going
13 to testify or not testify?
14 THE DEFENDANT: No.

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16 MS. NETHERCOTT: Kevin, one more thing.
17 Stand up for a minute, please.
18 One more thing I want to explain to you
19 that Judge Hinkel has just pointed out to me. In
20 the event you do not testify, you are entitled, you
21 have the right to have the jury instructed that
22 under the law, they must not infer from your failure
23 to testify in this case that you are a first degree
24 principal or, in this case, to make any decision
25 about what the appropriate penalty would be based on

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1 that. They would be instructed if your lawyers, if
2 you, after discussing it with me, wanted this
3 instruction given to the jury, they would be told
4 that they were not to infer anything from that and
5 they were to decide this case solely on the evidence
6 that's been presented. Do you understand that?
7 THE DEFENDANT: Yeah.
8 MS. NETHERCOTT: Okay.
9 THE COURT: And your decision is? Which?
10 THE DEFENDANT: No.

* * * *

17 MR. SCHLAICH: Your Honor, continuing the
18 defense case, I would at this time offer into
19 evidence three pictures that have been marked
20 Defendant's Exhibits 10, 11 and 12. Your Honor,
21 during the testimony of Sergeant O'Neill, the
22 question was raised about some pictures of the
23 inside of Ms. Lacs' car which we did not have

24 available to us at the time, either the State or the
25 defense. These three pictures, 10, 11 and 12, are

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1 pictures of the inside of the car, and the State has
2 agreed that they are pictures of the inside of the
3 car taken and processed by the Crime Lab. So we
4 would be offering these as stipulation,
5 essentially, at this point.
6 MS. BROBST: So stipulated, Your Honor.
7 THE COURT: Okay. Would be Defendant's
8 10, 11 and 12.
9 (Defendant's Exhibit Nos. 10, 11, and 12,
10 photographs, were entered in evidence.)
11 MR. SCHLAICH: And I'd just like to show
12 those to the jury before we move on.
13 (Pause.)
14 MR. SCHLAICH: Your Honor, the defense
15 rests.

* * * *

Supreme Court, U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX
VOLUME II of II

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In the Circuit Court for Baltimore County, Maryland

State of Maryland
v. Case No. 88-CR-5464
Kevin Wiggins

Reporter's Official Transcript of Proceedings
(Instructions, Closing Argument and Verdict)

October 18, 1989
Towson, Maryland

Before:
Honorable J. William Hinkel, Associate Judge And a Jury

* * * *

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* * * *

7 THE COURT: Ladies and gentlemen, it is now time
8 for me to instruct you with respect to the law. I will first
9 give you some general instructions on the law that apply to
10 all of this proceeding, and then I will instruct you on the
11 law that additionally applies to capital sentencing
12 proceedings.
13 My instructions concerning the law are binding
14 upon you and must be followed in determining the sentence. It
15 is, however, your recollection of the facts and your
16 determination of the weight and credibility of any facts and
17 testimony which controls.
18 You must determine the facts from the evidence
19 received in this trial and not from any other source. A fact
20 is something proved directly or circumstantially by the
21 evidence or by stipulation. Stipulation is an agreement
22 between attorneys regarding the facts.

23 You must apply the rules of law that I state to
24 you to the facts as you determine them to be, and in this way
25 arrive at your decision. Wherever in the course of these

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1 instructions I use the term sentence, decision, verdict,
2 they're basically the same meaning. What I'm referring to is
3 your ultimate decision with respect to sentencing.
4 You must accept and follow the law as I state it
5 to you, whether or not you agree with the law. If anything
6 concerning the law is said by the lawyers in their arguments
7 or at any other time during the trial which conflicts with my
8 instructions on the law, you must follow my instructions. You
9 must conscientiously consider and weigh the evidence and apply
10 the law. Any verdict you return must be a just verdict.
11 In determining the facts of the case, you should
12 make a finding of the facts solely from the evidence which has
13 been introduced at this trial, the evidence which you have
14 seen and heard and not from anything which you have seen or
15 heard elsewhere. This includes any reasonable inferences
16 which may be drawn from the evidence. Where there are two
17 inferences which may reasonably be drawn from the same
18 evidence, the defendant is entitled to the inference which is
19 favorable to him.
20 The evidence in this case which you are to
21 consider in arriving at your verdict is the testimony which
22 you have heard from the witness stand, the exhibits which have
23 been received into evidence, and the stipulations which have
24 been made by the parties.
25 A stipulation is the term used for an agreement

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1 made by the lawyers in a case. Stipulations are binding and
2 conclusive on the respective parties. When the attorneys on
3 each side stipulate to the existence of a fact or event, that
4 fact or event is deemed to be evidence in the case and you
5 should regard it as proof.
6 In this case, the parties entered into a number
7 of stipulations which are marked as exhibits and they are
8 titled stipulations, and you will see them in the evidence
9 that you take back to the jury room with you.
10 The law permits you to infer that the possessor
11 of recently stolen property, that is, property taken in a
12 crime, is the person who stole the property. It is not
13 required that you draw that inference. This inference is
14 permissible only if it is reasonable and there is no other
15 reasonable inference to be drawn from the evidence.
16 A defendant has a common law right to allocution,
17 that is, to address the sentencing body in mitigation of
18 punishment. You, of course, are the sentencing body.
19 Although this statement in allocution is not sworn testimony
20 and during allocution he is not under oath and is not
21 subjected to cross-examination, the defendant's allocution is
22 evidence and you should give it the weight and credence you
23 would give any other piece of evidence.
24 Any questions that I may have asked during the
25 course of the trial were merely to elicit information or to

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1 clarify testimony so you could have all the facts clearly
2 before you. You should not read into my questions any feeling
3 one way or the other regarding any witness, any testimony, or
4 the issue in the case, nor should you try to ascertain from my

questions or my conduct what I feel your decision should be.
That is for you to decide.
Ladies and gentlemen, you are the sole judges of whether a witness should be believed. In making this decision, you may apply your own common sense and everyday experiences. In determining whether a witness should be believed, you should carefully judge all of the testimony and evidence and the circumstances under which that witness testified. You should consider such factors as the witness' behavior on the stand and manner of testifying, did the witness appear to be telling the truth, the witness' opportunity to see or hear the things about which testimony was given, the accuracy of the witness' memory, does the witness have a motive not to tell the truth, does the witness have an interest in the outcome of the case, was the witness' testimony consistent, and was the witness' testimony supported or contradicted by evidence that you believe.
You need not believe any witness, even if the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witness. What I'm saying to you, it is for you to determine what it is you believe the facts to

be from all of the evidence.
In weighing the testimony and arriving at your decision, you are not to be influenced by questions of public interest or policy, or the effect your verdict may have upon other persons charged with crimes, or whether the verdict should or would not be pleasing to me. Your verdict must be based upon the evidence or lack of it, and nothing else.
You are also instructed that a witness who has special training or experience in a given field is permitted to express opinions based on observed or assumed facts to aid

you in deciding the issues in the case. In weighing the opinions of an expert, you should consider the expert's experience, training and skills, as well as the expert's knowledge of the subject matter about which the expert is expressing an opinion. You should give the testimony the weight and value you believe it should have.
You are not required to accept any expert's opinion. You should consider an expert's opinion together with all of the other evidence. If contradictory or conflicting testimony is put forth by expert witnesses, you must resolve the conflict and determine how much weight to give to any opinion. Of course, I'm referring to those persons who were offered and accepted by the Court as experts in this case.
Evidence consists of testimony of witnesses,

writings, material objects, or anything presented to the sentencer and offered to prove the existence or nonexistence of facts.
In this case we have got evidence coming in several forms. Evidence is either direct or circumstantial. Direct evidence is evidence that directly proves a fact, without the necessity of any inference. It is evidence which by itself, if found to be true, establishes the fact.
Circumstantial evidence is evidence that if found to be true proves a fact from which an inference of the existence of another fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
It is not necessary that the facts be proved by direct evidence. They may be proved also by circumstantial

17 evidence or by a combination of direct evidence and
18 circumstantial evidence. Both direct evidence and
19 circumstantial evidence are acceptable as a means of proof.
20 Neither is entitled to any greater weight than the other.
21 Now, ladies and gentlemen, Kevin Wiggins has been
22 convicted of murder in the first degree of Florence Lacs and
23 the robbery of Florence Lacs. This conviction is binding upon
24 you. Even if you believe the conviction to have been in
25 error, you must accept that fact. You may, however, consider

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1 the evidence presented in this trial concerning his guilt in
2 reaching your decision in this case.
3 At this time, I'm going to ask my law clerk, if
4 she will, to pass out to you the sentencing form.
5 Does everyone have one? Okay. These copies have
6 been prepared for each of you to review while I give these
7 instructions and to refer to by you during your deliberations.
8 You will be provided with the original of the
9 verdict form, which I have here in order to record your
10 verdict. The original, which is marked original, is the
11 official document on which you are to record your verdict and
12 which each of you must sign.
13 Although the form contains spaces for answers to
14 be checked off, you are not to engage in a mere mechanical
15 tallying of aggravating and mitigating circumstances. It is
16 your duty to weigh each of the factors, both aggravating and
17 mitigating, to determine whether the sentence shall be life
18 imprisonment or death.
19 Your first task is to determine in Section I,
20 which is the first page -- your first task, as I said, is to
21 determine in Section I of this form whether you are
22 unanimously persuaded beyond a reasonable doubt that the

23 defendant was a principal in the first degree to the murder of
24 Florence Lacs.
25 The defendant's conviction of first degree murder

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1 does not establish that he was a principal in the first
2 degree. A principal in the first degree is one who actually
3 committed the murder by his own hands. The State has the
4 burden of persuading you beyond a reasonable doubt that the
5 defendant was a principal in the first degree to the murder.
6 The defendant is not required to persuade you that he was not
7 a principal in the first degree.
8 A reasonable doubt is a doubt founded upon
9 reason. It is not a fanciful doubt, a whimsical doubt, or a
10 capricious doubt. Proof beyond a reasonable doubt requires
11 such proof as would convince you of the truth of a fact to the
12 extent that you would be willing to act upon such belief
13 without reservation in an important matter in your own
14 business or professional affairs.
15 Now, if you do not find beyond a reasonable doubt
16 that Kevin Wiggins was a principal in the first degree, that
17 is, you do not find that Kevin Wiggins was the person who
18 actually caused Florence Lacs' death, then you much check not
19 proven as to item Number 1 under Section I.
20 You must then proceed directly to Section V and
21 state that conclusion in writing by filling in life
22 imprisonment in the space at the end of Section V. If life
23 imprisonment is entered in Section V, you must then proceed to
24 Section VI.
25 Now, if you do find beyond a reasonable doubt

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that Kevin Wiggins was a principal in the first degree, that is, that the defendant was the person who actually killed, caused Florence Lacs' death, then you must check proven as to this item under Section I. If you check proven, then you must proceed to Section II. Turn to the Section page and you will see Section II.

In determining the existence or nonexistence of the aggravating circumstance under Section II, you must consider whether the State has proven beyond a reasonable doubt that Kevin Wiggins committed the murder of Florence Lacs while committing or attempting to commit a robbery.

Robbery is the taking and carrying away of someone else's personal property directly from that person or from her presence by violence or by putting that person in fear with the intent to steal the property. In order to determine that a robbery has occurred, the State must prove that the defendant obtained possession of personal property belonging to someone else, that the property was taken either directly from another person or from another person's presence and control, that the taking was accomplished by violence or by putting the other person in fear of violence, and that the defendant intended to permanently deprive the other person of that property. Of course, the other person I'm speaking of here is Florence Lacs.

Property is taken from the victim's presence if

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it is within her control, so that she could have prevented its taking had she not been killed. The robbery need not be completed until after the victim's death. The killing alone may constitute the element of force. The intent to steal need

not be performed until after -- that is, the intent to steal need not be formed until after the force, even if the force results in death. A taking after death is nevertheless robbery.

It is your duty to decide whether the State has proven beyond a reasonable doubt that the murder occurred in the course of the aggravating circumstance of robbery or attempted robbery. Aggravating as used here means something which makes a thing worse. If you do not find beyond a reasonable doubt that the murder occurred during the aggravating factor, that is, that Kevin Wiggins did not commit the murder of Florence Lacs while committing or attempting to commit a robbery, then you must check not proven as to this item under Section II.

If you do find beyond a reasonable doubt that the aggravating factor exists, that is, that Kevin Wiggins did commit the murder of Florence Lacs while committing or attempting to commit a robbery, then you must check proven as to this item under Section II.

If this item is checked not proven, you must then proceed directly to Section V and state the conclusion in

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writing by filling in life imprisonment in the space at the end of Section V. If life imprisonment is entered in Section V, you must then proceed to Section VI.

If this aggravating circumstance under Section II is marked proven, then you must proceed to Section III. Section III begins at the bottom of Page 2. In determining whether mitigating circumstances exist under Section III, you must determine whether the defendant has shown by a preponderance of the evidence that they do exist.

Each one of you should individually consider each

circumstance. If you do agree unanimously by a preponderance of the evidence that the mitigating circumstance exists, you must check (a). You will see that there are three places, (a), (b) and (c). You must check (a) under the corresponding mitigating circumstance under Section III.
THE FORELADY: Ours is already checked off.
THE COURT: I'll get to that. Hold on. If you unanimously find by a preponderance of the evidence that the above circumstance does not exist, you must check (b) under the corresponding mitigating circumstance under III. If after a reasonable period of deliberation one or more of you, but fewer than all twelve, find by a preponderance of the evidence that the mitigating circumstance exists, you must check (c) under the corresponding circumstance under Section III.

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To prove something by a preponderance of the evidence means to prove that something is more likely so than not so. It is not as high a standard as beyond a reasonable doubt.
A mitigating circumstance is simply any aspect of a person's character or background or any of the circumstances of the offense offered to you as a basis for a sentence less than death.
Now, in determining whether mitigating circumstances exist by a preponderance of the evidence, you must consider the following mitigating circumstances. There are seven statutory mitigating circumstances, and I'll go through each one of those for you now.
(1), Kevin Wiggins was not previously -- or has not previously been found guilty of a crime of violence, entered a plea of guilty or nolo contendere to a charge of a

crime of violence, or had been granted probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph as I explain it to you now, crime of violence means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

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You are instructed that the State and the defendant agree that this circumstance exists, and your form has been premarked proven. That is, that he has not been convicted of the things I just listed for you. So that's why that's marked not proven -- excuse me, proven. They agree that it is proven as a mitigating circumstance.
Now, you must address yourselves to determining whether the remaining statutory mitigating circumstances exist. They are:
(2), Florence Lacs was a participant in Kevin Wiggins' conduct or consented to the act which caused her death.
(3), Kevin Wiggins acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.
(4), the murder was committed while the capacity of Kevin Wiggins to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance or intoxication.
(5), the youthful age of Kevin Wiggins at the

time of the crime.
(6), the act of Kevin Wiggins was not the sole
proximate cause of the death of Florence Lacs.

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And, (7), it is unlikely that Kevin Wiggins will
engage in further criminal activity that would constitute a
continuing threat to society.
They are the seven statutory mitigating
circumstances.
Under (8) you will see any other facts which you
specifically set forth in writing that you find as mitigating
circumstances in the case, that is, any other evidence of
probative value and relevant to sentencing, including any
evidence you have learned in court about the defendant and the
crime.
Section (8) mitigating factors are non-statutory
mitigating factors. This is where you are each allowed to
list anything you personally find constitutes a mitigating
circumstance.
In order to find that a mitigating factor exists
under Section (8), you must find two things by a preponderance
of the evidence. You must first find that the alleged
circumstance exists in this case. You must next find that the
alleged circumstance is in fact mitigating.
You may consider evidence relating to the
defendant's background, as well as relevant and material
conduct of the defendant up to and including this sentencing
proceeding. Those non-statutory mitigating circumstances upon
which you unanimously agree are listed in (8)(a). Those upon

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which you cannot reach unanimity are listed in (8)(b). If any
one of you determines by a preponderance of the evidence that
a mitigating factor exists, but all twelve of you don't agree
upon it, you still list that under (8)(b). With respect to
the mitigating circumstances, each one of you should
individually consider each circumstance.
Next you shall then determine whether by a
preponderance of the evidence the aggravating circumstance
outweighs the mitigating circumstances. If you do not find by
a preponderance of the evidence that the aggravating
circumstance outweighs the mitigating circumstances, the
sentence shall be life imprisonment. You must then proceed
directly to Section V and state that conclusion in writing by
filling in life imprisonment in the space at the end of
Section V.
If you unanimously find that the State has proven
by a preponderance of the evidence that the aggravating
circumstance does outweigh the mitigating circumstances, then
consider whether death is the appropriate sentence. You must
then proceed directly to Section V and state that conclusion
in writing by filling in death or life imprisonment in the
space at the end of Section V. If death is entered in Section
V, do not proceed to Section VI. If life imprisonment is
entered in Section V, you must then proceed to Section VI.
If you unanimously find that the sentence of life

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imprisonment should be without the possibility of parole, mark
yes in the space provided. If you unanimously find that the
sentence of life imprisonment should be with the possibility
of parole, mark no in the space provided. Your determination

shall be in writing on the original form given to your Forelady and shall be signed by the Forelady and all members of the jury.
It is proper for you to exercise your own moral, factual and legal judgment in determining whether any aggravating circumstance you may find is sufficient in your mind to call for the punishment of death. You may decide that the aggravating factor proved by the State is not a sufficient reason to impose a death sentence and on that basis alone decide to impose a life sentence. Nothing in the law forbids you from extending mercy out of the belief that life imprisonment is sufficient punishment under all the circumstances.
If you sentence Kevin Wiggins to life imprisonment without the possibility of parole, he will never be eligible for parole. If you sentence the defendant to life imprisonment, he will not be eligible for parole considerations until he has served twenty-five years or the equal of twenty-five years when considering certain allowances for diminution for the period of confinement provided for in Article 27, Section 700 and Article 27, Section 638 C of the

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Annotated Code of Maryland.
Additionally, in the event that at some future date the Parole Commission recommended that Kevin Wiggins be released on parole, he could only be paroled if that decision was specifically approved by the Governor of Maryland.
The Supreme Court of the United States as well as the Court of Appeals of Maryland have determined that the death penalty or capital punishment is constitutional and legal in such cases and under such circumstances as the law provides. I cannot overrule your decision. The

responsibility for determining whether the death penalty should be imposed rests solely with you, and you must act with due regard for the consequences of your decision.
Now, let me just restate a couple of things. The State has the burden of proving that Kevin Wiggins was a principal in the first degree of murder and the aggravating circumstance beyond a reasonable doubt.
The defendant has the burden of proving the existence of mitigating circumstances by a preponderance of the evidence.
The State has the burden of proving that the aggravating circumstance outweighs the mitigating circumstances by a preponderance of the evidence.
Now, before arriving at your verdict, you are to consider all of the evidence in the case. You are to consider

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all of the evidence that is favorable to the defendant, as well as all which is unfavorable to him. Moreover, your verdict, whatever it may be, must be the unanimous verdict of all twelve members of the jury.
Do counsel wish to see me here at the bench?
MS. BROBST: Yes, your Honor.
MS. NETHERCOTT: Yes, your Honor.
(Counsel and the defendant approached the bench and the following ensued:)
MS. BROBST: Thank you, your Honor. I don't know if you defined unanimity. That was the only thing I noticed that wasn't given a definition.
THE COURT: It must be the unanimous verdict of all twelve members of the jury. If you want me to say that unanimous means all twelve members of the jury, does the defense wish me to say that?

17 MS. NETHERCOTT: I have no problem with that.
18 MS. BROBST: On mitigating circumstance No. 1,
19 you misspoke and didn't say under crimes of violence and
20 attempt to commit. You just said commit.
21 THE COURT: Okay.
22 MS. BROBST: I think that's in his favor and
23 should be said. And in mitigating circumstance No. 4, you
24 said intoxication, which no longer exists and is not on the
25 form.

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1 THE COURT: I took it right out of your
2 instruction.
3 MS. BROBST: I am not objecting to that; I'm just
4 pointing out what I noticed.
5 THE COURT: Does the defense have any problem in
6 it being in there?
7 MS. NETHERCOTT: It is not really an issue.
8 THE COURT: Do you object to it? Do you want me
9 to go back and change it?
10 MR. SCHLAICH: No.
11 MS. BROBST: The other thing, we would except at
12 this time to your instruction in Section V which states that
13 if they find that the aggravating circumstance outweighs the
14 mitigating circumstances by a preponderance of the evidence,
15 then they should go on to consider whether the sentence of
16 death is appropriate. And we would except, also, to your
17 instructions at that point.
18 THE COURT: Okay. First, as to the exceptions of
19 the State, do you wish me to correct any of those that the
20 State has raised?
21 MR. SCHLAICH: No, sir.
22 THE COURT: Okay. Now, your exceptions?

23 MS. NETHERCOTT: Thank you, your Honor. Just
24 bear with me a second. I'm trying to put them in numerical
25 order.

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1 Your Honor, with regard to the Court's
2 instructions regarding allocution, I understand that the Court
3 of Appeals of Maryland has ruled that in the event a defendant
4 allocutes, the State is permitted to comment on his failure --
5 I understand the Court of Appeals of Maryland has agreed that
6 in allocuting, if the defendant elects to allocute, the State
7 is free to comment on the fact that the defendant was not
8 under oath. And I understand the Court is bound by that.
9 However, for purposes of federal preservation of
10 the issue, I would object to that instruction as an
11 impermissible comment of the defendant's failure to testify
12 under Zant v. Stephens. I don't have the citation.
13 Essentially the argument is, your Honor, that the
14 right of allocution is meaningless if it is in fact opening
15 the defendant into having that turned around to arguing that
16 goes to the punishment of the death penalty. So I would
17 except to the Court's instruction with regard to that. And
18 for the record I would note that defendant's proposed
19 instruction 4 is what we would ask to be made part of the
20 record.
21 With regard to the instruction on robbery, your
22 Honor, I would reiterate what I had said in chambers yesterday
23 regarding the Stebbing and Foster issue, that is, that a
24 capital crime is a separate category of crime; therefore,
25 there should be a stricter standard with regard to

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construction of that felony murder doctrine and it should require a showing of a contemporaneousness of an intent to do the act. I would argue those cases are factually distinguishable from the evidence presented in this case and except to that.
I would also except to the Court's instructions with regard to the definition of aggravating as something that makes it worse, that aggravating in this context is a reason to impose the death penalty.
I would object, take exception to the Court's instruction regarding the preponderance of evidence standard that the Court instructed on. With regard to the defendant's burden to produce and persuade with respect to the existence of both statutory and non-statutory mitigating circumstances, I would argue as I argued pretrial that the defendant should not bear any such burden. That is unconstitutional both under the Maryland Declaration of Rights, Article 21 through 24, and the Federal Constitution, Amendments 5, 8, 6 and 14.
Also, on the question of the mitigating circumstances, I would take exception to the Court's failure to instruct as requested by defense counsel in defense proposed instruction 14, that the jury be advised that mitigation evidence is not an excuse or justification.
With respect to the weighing process of the aggravating and mitigating factors, again I would except to

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the Court's instruction on that, and note for the record that I would have asked that the Court instruct with regard to the weighing process on aggravating and mitigating circumstances, and specifically request at this time again that the Court

instruct in accordance with defendant's proposed instruction 15 on that point for all the reasons and authorities given in support of those reasons in the instruction. Essentially the instruction would require that the State prove beyond a reasonable doubt rather than by the lower preponderance of evidence standard.
With respect to the Court's instruction on life without parole, the defense would except and ask that the Court -- again ask the Court instruct in accordance with defendant's proposed instruction No. 22. The specific difference between the Court's instruction and ours is we would ask that the State prove beyond a reasonable doubt that an appropriate sentence would be life without the possibility of parole.
Just bear with me for one minute, Judge. Your Honor, I would ask at this time that the instructions I've referred to by number here be incorporated as part of the record and, in addition, that the defendant's proposed sentencing and findings and determination form which reflects the various exceptions that I'm making at this time and the objections I have raised pre-sentence with regard to all of

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these things I've outlined be incorporated as exhibits and made part of the record.
THE COURT: That will be done. Anything else?
MS. NETHERCOTT: I don't think so.
THE COURT: Does the State wish to respond?
MS. BROBST: No. We would request that you not grant any of the exceptions the defendant has raised.

* * * *

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1 THE COURT: Ladies and gentlemen, at this time
2 you will hear the closing statements of counsel. Ms. Coffin?
3 MS. COFFIN: Thank you, your Honor.
4 Ladies and gentlemen, I'd like to begin by
5 thanking you for the undertaking you have done in this
6 proceeding. You have undertaken this awesome responsibility.
7 What you are going to decide today is not -- you did not seek
8 out, but you did agree to perform.
9 I also would like to tell you that neither myself
10 nor Ann Brobst enjoy being in these proceedings.
11 MR. SCHLAICH: Objection.
12 THE COURT: Overruled.
13 MS. COFFIN: We do not relish standing up here
14 and asking you to sentence Kevin Wiggins to death. But it is
15 our job, and it is your job as well --
16 MR. SCHLAICH: Objection.
17 MS. NETHERCOTT: Objection.
18 THE COURT: Overruled.
19 MS. COFFIN: -- as the defendant has elected to
20 have you make that decision.
21 On Thursday you folks came into this courtroom
22 and you all swore an oath, each and every one of you. You
23 swore in that oath that none of you had such strong feelings
24 about the death penalty one way or another that would cause
25 you to automatically vote for or against it. And we call upon

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1 you today to live up to that oath. We call upon you today to
2 render a sentence that is right and a sentence that is just.
3 At this point in the proceeding, as the Judge has
4 instructed you, the defendant has been found guilty of the

5 murder of Florence Lacs and the robbery of Florence Lacs.
6 However, in this proceeding, you have additional findings you
7 must make, as the Judge has just instructed you.
8 You must make the determination as to whether
9 Kevin Wiggins was the principal in the first degree, that is,
10 did he actually cause the death of Florence Lacs.
11 You also must determine whether there is an
12 aggravating circumstance in this case beyond a reasonable
13 doubt, that is, whether the murder was committed while the
14 defendant was attempting to commit or committing the robbery.
15 Over these past several days you have heard a
16 great deal of evidence, a good bit of which has been
17 circumstantial evidence. The judge has instructed you what
18 circumstantial evidence is.
19 Circumstantial evidence is proof of a collateral
20 fact on which you may infer the remaining facts, based upon
21 your common sense and reason. That circumstantial evidence is
22 not to be given any more weight or less weight than any other
23 evidence.
24 Going back to our first day, or actually the
25 second day, Ms. Nethercott addressed you in opening, and she

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1 told you that no one actually saw Kevin Wiggins murder
2 Florence Lacs or rob her. And that's right.
3 Only two people know exactly what happened on
4 September 15, 1988. One is dead and one is being sentenced
5 here today for the murder. What we do have is evidence that
6 when pieced together tells us how, when, and who murdered
7 Florence Lacs.
8 How did Florence Lacs die? Dr. Korell testified
9 from the Medical Examiner's Office that the manner of death
10 was homicide. She based that opinion on a number of factors.

Those factors were her home had been ransacked. Her property was taken. She was found submerged in a bathtub. She was found submerged in a bathtub with clothes on. She was wounded, and there was Black Flag sprayed on her body. You also heard Dr. Korell testify as to the cause of death, cause of death being drowning, combined with Mrs. Lacs' physical condition, her heart disease, which Dr. Korell termed hardening of the arteries, something we know, combined also with the stress of her situation.

This opinion is based upon the facts that during the course of the autopsy Dr. Korell found Florence Lacs' lungs were boggy, the condition of her heart at the time of her death, and the fact that she was submerged in a bathtub when she was found on the 17th of September.

Dr. Korell was asked by Mr. Schlaich, would her

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opinion be different if Florence Lacs had been found dead on the floor, would that opinion be that she had a heart disease or heart attack. Ladies and gentlemen, Florence Lacs was not found on the floor; she was found submerged in the bathtub. And Kevin Wiggins is no less responsible for her murder because when he forced her head under water her heart also stopped.

We have evidence that when we piece it together, we know now Florence Lacs was murdered. Florence Lacs was last seen alive on September 15th by Delores Elgert at approximately 4 p.m. when Mrs. Lacs dropped Mrs. Elgert off at the senior citizens' luncheon.

At that time Mrs. Elgert tells us Florence Lacs was wearing a white blouse and a light blue skirt. Ladies and gentlemen, when you go to deliberate, view those photographs. Look at what Florence Lacs is wearing. She is in a white

blouse and blue skirt, the same clothes she was wearing on Thursday, the 15th of September.

We heard testimony from Detective Crabbs when he was processing the scene that in her clothes hamper he found three kitchen towels, a pink blouse and a pair of yellow underwear, no dress, no red skirt.

We also know that Mrs. Lacs was alive at approximately 4 to 5 p.m., 5 p.m., when Chianti Thomas saw her outside of her apartment, 1951 Apartment C Woodlawn Drive.

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Chianti tells us at that time the defendant was also with her. What an incredible coincidence that the defendant is seen with Mrs. Lacs the last time she was seen alive.

We have the TV Guides Detective Crabbs testified to. Those TV Guides have been marked the dates of September 10th through the 15th, Thursday. They were unmarked September 16.

MR. SCHLAICH: Objection. Your Honor, may we approach the bench, please?

THE COURT: Overruled.

MS. COFFIN: We also have evidence that the defendant had in his possession on September 15th Florence Lacs' Hecht's card. He was shopping at Hecht's 8:57 p.m. on Thursday with Florence Lacs' credit card.

He had her car on the 15th, approximately 7 p.m., when he went to pick up Geraldine Armstrong. He was in Mrs. Lacs' car.

What an incredible coincidence that the man who was seen with Mrs. Lacs when she was last seen alive is now in possession of her credit card and her car.

We had testimony in this case from three medical examiners, all of whom testified that they could agree to one

23 thing. They could not pinpoint or exactly establish a time of
24 death. What they could give us was ranges and estimations.
25 The State had two medical examiners who testified

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1 that the range was twenty-four to forty-eight hours from the
2 time Mrs. Lacs was found. The defense's expert testified that
3 the range of death was twenty-four to thirty-six hours from
4 the time she was found dead.
5 Ladies and gentlemen, the key piece of evidence
6 to determine when Florence Lacs died does not come from an
7 expert. It comes from using your common sense on the basis of
8 facts that are in evidence. We know that Kevin Wiggins had
9 Florence Lacs' car and credit card the evening of September
10 15, 1988. When he had her property, she was surely dead. She
11 didn't live beyond the ransacking of her home, the taking of
12 her property, turning over of her personal wallet and the
13 taking of her keys. We know he had this property as a fact
14 per the stipulation.
15 He had her Hecht's credit card on the 15th as
16 well as her Penney's credit card. This tells us the time of
17 death based on common sense.
18 This leads us also to the testimony of Edythe
19 Vassar. Mrs. Vassar testified that she was a friend of
20 Florence Lacs. She testified that she spoke on the telephone
21 with Florence Lacs on September 16th, Friday, in the morning.
22 Ladies and gentlemen, Edythe Vassar is not lying,
23 but she is mistaken, and she is mistaken for the same reason.
24 Mrs. Vassar testified that in the course of that conversation
25 on the 16th in the morning, nothing unusual occurred, that

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1 Mrs. Lacs said, I have to go back to the store, a quick
2 conversation.
3 By the 16th, the defendant had had Mrs. Lacs' car
4 overnight and was shopping with her credit cards. When Mrs.
5 Vassar tells us that Mrs. Lacs said, I've got to go back to
6 the store, that indicates Mrs. Lacs surely must have been to
7 the store that morning and that she needed to go back. Mrs.
8 Lacs could not have gone to the store on the 16th and not
9 discovered her car missing, not discovered her wallet missing,
10 and her credit cards gone. And had she made these
11 discoveries, she surely would have told Mrs. Vassar in the
12 phone conversation that occurred on the 16th.
13 Mrs. Lacs did not live in that apartment after
14 her car was taken, the apartment was ransacked, and the credit
15 cards taken and her keys taken.
16 What evidence is there as to who murdered
17 Florence Lacs in this case, who actually caused the death of
18 Florence Lacs? The defendant had opportunity, guilty
19 knowledge, and he was in possession of recently stolen
20 property.
21 On Wednesday, the 14th of September, the
22 defendant got a job at the Park Manor Apartments, the complex
23 where Mrs. Lacs lived. On Thursday, the 15th of September,
24 the defendant was working in Apartment F, directly across from
25 Apartment C, 1951 Woodlawn Drive, where Florence Lacs lived.

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1 The defendant knew what car Mrs. Lacs owned. She
2 identified that car to him when she called from the window to
3 the defendant, are you blocking my car, I need to go out.
4 He was seen talking to Mrs. Lacs at approximately

5 5 p.m., the last time she was ever seen alive. At this point
6 he knew her, her apartment, and her car.
7 We have evidence that approximately between 4:45
8 and 5 o'clock the defendant was engaged in moving sheetrock at
9 no one's request or direction, that after he had moved the
10 sheetrock, he returned to the maintenance office and he
11 informed Robert Weinberg that he had done this. This return
12 was approximately twenty minutes after he had been released.
13 Ladies and gentlemen, why did he do these things?
14 Was he worried about the sheetrock left outside, that he had
15 to bring it inside the apartment complex so that nothing would
16 happen to it? Well, we know from Chianti Thomas that he
17 didn't feel confident having it in the apartment complex
18 because he asked Mrs. Lacs to watch it. We know he didn't
19 have a key to Apartment F. He couldn't put it in there.
20 We also know that he was not so concerned that
21 when he returned to the maintenance shop and told Mr. Weinberg
22 what he had done, that he said, we should lock this up, give
23 me the keys to the apartment or to the car so I can take care
24 of this. Why did he do these things? He didn't care about
25 the sheetrock. He needed to explain, if seen, why he was

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1 still in the area.
2 Why did he leave the sheetrock? The defendant
3 used that sheetrock to meet, to know Florence Lacs. At this
4 point the defendant knew Florence Lacs, and now Florence Lacs
5 knew the defendant. They had spoken. This is important.
6 There was no forced entry into her apartment. She opened the
7 door and let her murderer in.
8 We have evidence that the defendant was in
9 possession of recently stolen property. The Judge has
10 instructed you that you may infer all reasonable inferences

11 from that possession, that you may infer that the possessor of
12 recently stolen property is the thief.
13 Ladies and gentlemen, you may infer that when --
14 MR. SCHLAICH: Objection.
15 THE COURT: Overruled.
16 MS. COFFIN: -- when the theft occurred and the
17 robbery also takes place, that the possessor is also the
18 robber. And if during the course of a robbery that victim is
19 murdered, you may reasonably infer that the robber was the
20 murderer.
21 In this case, how recent is the possession of
22 these stolen goods? Again, Florence Lacs had her property 4
23 p.m. on the 15th, when she dropped Mrs. Elgert off at the
24 senior citizens' luncheon. By 7 p.m. the defendant has her
25 car. By 8:57 he is shopping in Hecht's.

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1 On the 16th, he is using her Hecht's, her
2 Penney's, and her Sears credit card. By the 17th, he and
3 Armstrong have pawned Mrs. Lacs' engagement ring. That pawn
4 ticket was found in the defendant's wallet when he was
5 arrested.
6 The defendant had guilty knowledge of Mrs. Lacs.
7 Throughout this -- of his possession, he lied to Geraldine
8 Armstrong. The credit cards weren't his. The car was from a
9 friend. The ring was found.
10 When he was shopping at Penney's he gave a false
11 name and a false address to Jeanetta Washington at J. C.
12 Penney's on a client card. He gave a false address on the
13 diamond certificate to Jeanetta Washington. And this is
14 interesting. The address he gave is 1951 Walnut Avenue, 1951.
15 Why? Why? Because he knew that address and he knew that
16 complex.

When the defendant was arrested, he made the statement to Detective Crabbs. While in the course of making that statement, Detective Crabbs asked the defendant where were you employed prior to your getting possession of that car? The defendant at that time says, I worked at 2051 Woodlawn Drive.
We know from Geraldine Armstrong the defendant knew that complex. He lived there. Why did he give a false address to Detective Crabbs? We know from the diamond certificate that

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he knew the right address, 1951. Why? He needed to put distance between himself and the place where he committed this murder.
He was asked by Detective Crabbs, had you ever seen that car before. The defendant said, I can't say I never seen it before in my life. I can't say I've never seen it before. Why did he say that? Because he knew he had seen it before and he knew Robert Weinberg had seen it before. In his statement he says, I saw the car on Friday, September 16, when it was stolen from the Roy Rogers parking lot. At that time I found the credit cards and I found the ring.
Why Friday? When he knew he was using those credit cards the night before Friday in Hecht's, making purchases. Why Friday? To put distance between himself and the murder.
Ladies and gentlemen, what we have is an incredible set of coincidences, coincidence that the defendant worked directly across in the apartment where Florence Lacs was murdered, coincidence that he knew her, her car, and her apartment, coincidence that he was the last one seeing her when she was last alive, coincidence that he was in possession of her credit cards, the car, the keys and engagement ring.

Incredible. So incredible that it is not mere coincidence.
Each piece of evidence points to Kevin Wiggins as the murderer of Florence Lacs, and Kevin Wiggins alone. Based

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upon this evidence, the State is asking you to find beyond a reasonable doubt that the defendant actually caused the murder of Florence Lacs, that he was a principal in the first degree.
It is also based upon this evidence that we are asking you to find the aggravating circumstance, that the murder was committed while the defendant was attempting to commit or committing a robbery.
The Judge instructed you that a robbery is the taking and carrying away of personal property of another from their person or their presence by violence or putting them in fear of violence, and having the intent to permanently deprive.
Further, the law recognizes that property is taken from the victim's presence if it is within her control, such that she could have prevented its taking had she not been killed. The killing alone may constitute the element of force. And the taking after death is robbery.
Now, the defense may argue to you that there is no specific evidence as to the time sequence of these events, as to the time sequence of the murder and the robbery. Again, they are right. But based upon the law as the Judge has instructed you and the facts that you have, you can find beyond a reasonable doubt that this murder was committed while attempting to commit or committing a robbery.
We know that the defendant took and carried away

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1 Mrs. Lacs' property and converted it to his own use. We know
2 this based upon the stipulations. And we know it from the
3 defendant's own statement. Thus we have that element of
4 robbery.
5 We have evidence that the property taken from her
6 was in her presence. We have evidence that the keys and the
7 credit cards were in her presence. Mrs. Vassar testified that
8 Mrs. Lacs had one set of keys and that one set of keys had
9 both her car keys and her apartment keys on them.
10 We also know that on the 15th at 4 o'clock, Mrs.
11 Lacs used her car, went home, and used her keys to get into
12 her apartment. Those keys were in her presence on the 15th.
13 We know, also, from Mrs. Vassar that Mrs. Lacs
14 kept her credit cards in her wallet, that when she had been
15 shopping with Mrs. Lacs, no cards were removed from the
16 wallet.
17 We know from Detective Crabbs that the wallet was
18 found in her bedroom on her bed in her home next to the purse
19 that had been emptied, or the wallet that had been emptied.
20 If she had been alive during the taking of that property, that
21 property was taken from her presence. And if she were dead
22 when that property was taken, it was taken from her presence,
23 because as the law says, the property was in her presence and
24 she could have prevented it but for her death, prevented the
25 taking.

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1 We have evidence that force was used in this.
2 There is evidence that there was bruising on Mrs. Lacs' body.
3 There is evidence that a struggle occurred prior to her death.
4 That evidence is one slipper was left in the hallway. The

5 other was taken to the bathtub where she was murdered. The
6 murder itself constitutes the force necessary to meet this
7 element.
8 And, ladies and gentlemen, the taking after death
9 is a robbery. All of this evidence shows that the murder was
10 committed while the defendant was attempting to commit or
11 committing a robbery. And we ask you to find that beyond a
12 reasonable doubt.
13 Having made these determinations and the findings
14 that the defendant was a principal in the first degree and
15 that the State has proven the aggravating circumstance beyond
16 a reasonable doubt, you must then engage in a balancing
17 process, that is, that the aggravating circumstance outweighs
18 the mitigating circumstance by a preponderance of the
19 evidence. And in so weighing, you make the decision as to
20 whether the appropriate sentence is life imprisonment or
21 death.
22 The State has conceded in this case that one of
23 the mitigating circumstances exists, that is, that the
24 defendant has no previous convictions or probations before
25 verdict for crimes of violence. And that's been so marked on

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1 the determination sheet.
2 However, there is no evidence that Mrs. Lacs was
3 a participant in the defendant's conduct or consented to the
4 act which caused her death.
5 There is no evidence that the defendant acted
6 under substantial duress, domination or provocation of another
7 person.
8 There is no evidence that the murder was
9 committed while the capacity of the defendant to appreciate
10 the criminality of his conduct or conform his conduct to the

requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance. There is no evidence the defendant was of a youthful age at the time of this crime. The evidence is that the defendant is a twenty-six year old man who had a child. There is no evidence that the defendant was not the sole proximate cause of the victim's death. There is no evidence that it is unlikely the defendant will engage in further criminal activity that would constitute a continuing threat to society. Dr. Johnson testified that lifers constitute better prisoners, there's better amenability while incarcerated. But Dr. Johnson also said he couldn't predict if the defendant, Kevin Wiggins, would fit in that estimation or that group.
Ladies and gentlemen, I submit to you that the

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only way we can be sure that Kevin Wiggins does not do to another person what he did to Florence Lacs is to impose --
MR. SCHLAICH: Objection.
THE COURT: Overruled.
MS. COFFIN: -- is to impose the death penalty.
Further, I submit to you that there is nothing that mitigates this offense. Does the mitigating circumstance outweigh the aggravating circumstance, the robbery, the facts? There is no sense to this crime. Florence Lacs had been kind.
MR. SCHLAICH: Objection.
MS. COFFIN: I'll watch your property for you.
MR. SCHLAICH: The objection is to saying Florence Lacs had been kind. There is no evidence --
THE COURT: Sustained.
MS. COFFIN: She watched the sheetrock for him and she let him into her home.

What happened next? Defendant knocks -- what happened next, Florence Lacs was knocked down, she was forced into a tub of water, her head was held under, and Black Flag was sprayed on her. Her skirt was hiked to her limbs. She had no underwear. She had no dignity.
For what? Jewelry. Then he sprayed Black Flag on her, as you would spray a bug or an animal. For what?
When you deliberate, consider this. Consider that Florence Lacs was a seventy-six year old woman who could

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offer no resistance to the defendant.
Consider the circumstances of the robbery. The defendant did not rob Florence Lacs so that he could provide food for his child, clothing for his child, food or clothing for he and his girlfriend, Geraldine Armstrong. No. Jewelry. Florence Lacs was murdered so that Kevin Wiggins could buy jewelry for Geraldine Armstrong and himself.
When you deliberate, ladies and gentlemen, imagine Florence Lacs in that house. Imagine spraying that Black Flag on her in that condition. What kind of a man does that?
When you balance the aggravating circumstance against the mitigating circumstance by a preponderance of the evidence, I submit to you that your only sentence can be death. Thank you very much.
MR. SCHLAICH: Your Honor, may we approach the bench just briefly, please?
THE COURT: Yes.
(Counsel and the defendant approached the bench and the following ensued:)
MR. SCHLAICH: Your Honor, I did not object to one point that arose several times on the State's closing, and

23 I did want to note an objection before it is lost. Repeatedly
24 the State noted that the weighing process is one of being by a
25 preponderance, and we in our instructions as asked and in our

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1 proposed findings and determination form take the position
2 that the constitutional standard should be beyond a reasonable
3 doubt. And we wanted to note an objection to that.
4 THE COURT: Okay. Overruled.
5 (Counsel and the defendant returned to the trial
6 tables.)
7 THE COURT: Mr. Schlaich?
8 MR. SCHLAICH: Good morning, ladies and
9 gentlemen. Ladies and gentlemen, in the year 2100 BC, a king
10 in the Middle East wrote a book to his son who was to succeed
11 him on the throne about how to mete out punishment on the
12 people of his kingdom in a just way. And he said: Do
13 justice, that you may live long upon earth. Calm the weeper.
14 Do not oust a man from his father's property. Do not degrade
15 magnates from their seats. Beware of punishing wrongfully.
16 Do not kill, for it will not profit you.
17 Now, I ask you how far has justice come in 4,000
18 years? Today you sit here trying to decide a rightful
19 punishment. You sit here trying to decide if the execution of
20 Kevin Wiggins will profit us as a society. Whether Kevin
21 Wiggins lives or dies is why you are here.
22 The State in its opening said you are here
23 because Florence Lacs died. That is wrong. Florence Lacs did
24 die a tragic death, and you should grieve for her. That is
25 not why you are here.

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1 You are here because our society chooses to say
2 execution may be an appropriate punishment in a small number
3 of cases, and it is your role to represent our society in
4 determining whether this case is one of those cases.
5 You are under no obligation to impose death. It
6 is not mandatory. It is never mandatory. The only mandatory
7 thing here is that you consider all of the evidence, follow
8 the law, follow your conscience, and follow your morals.
9 I submit to you that when you do just that, you
10 will reach a stunning conclusion, which is that you can't be
11 sure beyond a reasonable doubt that Kevin Wiggins had any role
12 at all in the murder of Ms. Lacs. But I remind you that he
13 has been convicted. You cannot change that. He will go to
14 prison for a minimum of life because of that conviction.
15 However, when you reach the conclusion I submit
16 you will, it still has vital importance. Because if you can't
17 be sure that Kevin Wiggins had any role in Ms. Lacs' death,
18 you cannot possibly find that the State has convinced you
19 beyond a reasonable doubt that he was the principal in the
20 first degree in her murder.
21 Which means if Florence Lacs did indeed die by
22 drowning, and I suggest that medically it is equally possible
23 that she had a heart attack, but assume that it is correct
24 that she died by drowning, if she did, the question you have
25 to decide beyond a reasonable doubt is did Kevin Wiggins

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1 personally put her in the water, and did he personally hold
2 her there or keep her there until she drowned. That's what
3 principal means in a death penalty case.
4 Isn't it at least reasonably possible, if not

highly probable, that Florence Lacs died at the hands of someone other than Kevin Wiggins? The evidence must cause you to answer this question yes.

What is the evidence? Well, I've made a chart here. I know the writing is kind of small, but there was a lot to put on. I hope that you can see it. I want to start with the things that are not in dispute, and what I've done is put the things not in dispute up there in black.

On Thursday, September 15th at 4:10, Florence Lacs drops Ms. Elgert off and presumably goes home. At approximately 5 o'clock, Chianti Thomas and Chentell Greewood see her in the hallway. A man thanks her for watching his sheetrock, and Ms. Lacs goes into her apartment. Both girls agree the man goes out.

You have also hear that 4:45, immediately before this, Kevin was told by his employer, the painters, to leave for the day and that he did. You also know that twenty minutes later, which would be 5:05, he comes back and he says he moved the sheetrock that was outside to the inside of the building. And in fact, he did do that.

At 7:30 he arrives at Geraldine Armstrong's house

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and he has the car and he has the cards. They use the cards Thursday. They use the cards Friday. They pawn the ring on Saturday. We're up to the 17th now.

We also know that on Saturday, Ms. Lacs does not appear for her card game and the police are called. We know that she's found on Saturday at 4 p.m. She is in a tub, not submerged. She's in a tub half full of water. The tub water has Black Flag in it. Her underwear is not on and there is underwear in the hamper.

At 9 p.m., Dr. Felsenberg, the Deputy County

Medical Examiner, sees the body, notes that rigor is present and notes nothing unusual about any temperature samplings in either the air or the water at that point.

We know that the following morning, Sunday, the 18th, at 9 a.m., Dr. Korell does her autopsy. At that point rigor is gone, lividity is fixed, and there is one bruise that she says is consistent with a struggle.

We know that on the 19th Kevin is still using the Citgo credit card because he used it that day. And on the 21st, he gets arrested in Ms. Lacs' car. And with him are Geraldine and the baby.

We also know some other things that don't fit exactly on the time line, but they're very important. There are seven prints. Two match the cops. Five don't match the cops. They come from interesting places, a door arch, an

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inside of the front door, and a soap box that's on the table.

We know they're not Kevin Wiggins fingerprints and we know that they are not able to match up even one similarity point between any of these five prints and Ms. Lacs.

We also know that found on the floor just inside her front door is the Ryder baseball hat that's in evidence.

We also know without dispute that Kevin Wiggins had no access to the keys to any of these apartments.

We also know that efforts were made to put -- to show that this hat was sold in a place that Kevin Wiggins had been to or to find someone that could put it on his head in any of these places or in his possession. And that was not done.

Now, what evidence is in dispute? By in dispute I mean either that questions were asked about it or there were

17 conflicting opinions, things like that. I filled that in in
18 red.
19 First of all, the clothing on Ms. Lacs. Well,
20 Ms. Elgert says it is a white shirt and light blue skirt. She
21 showed you the color in her dress, what light blue meant to
22 her. Chentell says she was wearing, when she saw her at 5
23 o'clock, a red skirt and a white shirt.
24 Some of the ladies that the police officer talked
25 to on Saturday said that when they saw Ms. Lacs on Thursday

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1 she was wearing a red dress.
2 On Friday at approximately 10 a.m., Ms. Vassar
3 takes a phone call from the person she knows to be Ms. Lacs.
4 Dr. Korell, the State's witness, testifies that
5 her time of death was -- was a minimum of twenty-four hours
6 and a maximum of forty-eight hours from when Dr. Felsenberg
7 made his notes. That means twenty-four hours back from 9 p.m.
8 Saturday, which is 9 p.m. Friday, to forty-eight hours back,
9 which is 9 p.m. Thursday.
10 Now, I would say that's in dispute for two
11 reasons. One, Dr. Comparini testifies a little differently,
12 but Dr. Korell originally concluded that Mrs. Lacs died on
13 Friday. And that's what she puts in the death certificate.
14 That's in evidence. Dr. Dixon testifies that her range is
15 exactly the same as what Dr. Korell reached. Hers must be
16 somewhat in dispute because the State brings her in as a
17 consultant and never even tells her that there was somebody
18 that said they talked to her alive on Friday. And that would
19 have been important to her to know in reaching her opinion.
20 We have produced Dr. Comparini. She has
21 testified that based on her examination and a thorough supply
22 of information about this case that she recited for you, she

23 would place the range of time of death from twenty-four hours
24 from the time the autopsy was done, which is 9 a.m. Sunday, to
25 thirty-six hours before that time. So we are are talking

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1 about twenty-four hours back, which is 9 a.m. Saturday, to
2 thirty-six hours back, which is 9 p.m. Friday. That's her
3 range.
4 Now, when you put all this together, what does it
5 mean? Well, you take this evidence, ladies and gentlemen, and
6 it reminds me of the saying, which is that, yes, Justice wears
7 a blindfold, but that does not hold her tears. Because the
8 evidence is staring at you and telling you that something is
9 very wrong with the State's case.
10 Ms. Vassar, Dr. Korell, Dr. Dixon, and Dr.
11 Comparini all support the conclusion that when Kevin Wiggins
12 had Mrs. Lacs' car and her credit cards at 7:30 Thursday
13 night, she was still alive.
14 The clothes Ms. Lacs was found in, you will see
15 the picture. It is in evidence. You have looked at it
16 already. I submit to you that that is a white blouse and a
17 teal skirt. Detective Crabbs has described it as a green
18 skirt. The one thing that I would say to you is it is
19 certainly not red, which two people at least said is what she
20 was wearing Thursday. And in Van Gogh's wildest manic
21 nightmare, this cannot be described as a light blue.
22 So if it is not what the two girls say she's
23 wearing Thursday, it is not what Ms. Elgert says she's wearing
24 Thursday, I suggest to you what she has on when she's found
25 dead were Friday's clothes.

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1 The fingerprints left behind in Ms. Lacs'
2 apartments are the killers. That's why they're there, and in
3 particular, the fingerprints that are on that soap box. You
4 see the pictures. You see how things have been moved around.
5 You see in those pictures the cleaning supplies pulled out of
6 the closet, placed on the floor, things stacked on the table.
7 One of the things stacked on the table is the soap box the
8 fingerprints came off of.
9 Who touched it? Who moved it? The killer did.
10 And that fingerprint is not Kevin's. What do these pieces of
11 evidence lead you to conclude? That Kevin Wiggins did not
12 murder Ms. Lacs to acquire her property.
13 This conclusion can be reinforced with some other
14 things you should consider. There is Black Flag in the water.
15 Let's assume that it is there because it was sprayed on Ms.
16 Lacs' body like the State tells you.
17 In their opening and again in their closing, they
18 pointed out to you how bizarre that was. What reason for that
19 is there? It is sick. They ask you, is there anything that
20 you know from this evidence about Kevin Wiggins that leads you
21 to conclude he is a bizarre person like that? Read that
22 pretrial investigation that the State put into evidence.
23 There is not one thing in there that would lead you to
24 conclude that Kevin Wiggins is this kind of a person.
25 Second, is there any reason to believe that a

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1 twenty-seven year old man with no prior record, not only no
2 prior record of a crime of violence, but no prior record at
3 all, nothing, who tries to work, who tries to keep a place to
4 live, would start his criminal career by murdering an elderly

5 woman for her orangish Chevette and her credit cards? The
6 answer to that is no.
7 If Kevin had murdered Mrs. Lacs for the car and
8 the credit cards, would he continue to use them six days later
9 on the 19th -- the 21st, rather? He is still using the car
10 when he gets caught. Would he be waiting to get caught with
11 items that will lead back to a murder? No.
12 But if he acquired those cards and that car
13 through some illicit source, admittedly illegal source other
14 than having murdered her for them, and if he knew nothing
15 about the fact that she was murdered to get these things,
16 would he continue to use them? I would say to you it is quite
17 likely that he would do that. Why be in fear?
18 Now, at this point I have to predict for you what
19 the State's response to the things I've said is going to be,
20 because they get to follow this up. They'll say believe
21 everything Ms. Vassar tells you about the cards and the keys,
22 but don't believe what she tells you about the phone call on
23 Friday, because she's mistaken. I don't see how they can draw
24 that distinction to begin with, but, okay.
25 But I ask you, why believe she's mistaken? She

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1 didn't seem feeble when she took the stand. She walks. She
2 can hear. She can see. She displayed true certainty to you
3 when she told you she talked to her friend on Friday.
4 The State says to you, she's mistaken because
5 there is nothing unusual about that conversation. But she
6 testified that she found out her friend had been murdered on
7 Saturday, and she told the cops on Saturday, one day later,
8 that she had talked to her friend on Friday. It is not a
9 question of whether she's mistaken a year later. She told
10 them this one day later. And she has remained sure of it ever

since.
And the other interesting thing about it is that
her 10 a.m. phone call on Friday fits not only the defense
medical testimony that says Ms. Lacs didn't die until 9
o'clock Friday night, it fits the State's testimony, which
says she may well not have died until 9 o'clock Friday night.
Yes, Ms. Vassar did talk to her alive on the phone Friday.
The State will tell you that Ms. Lacs must have
died Thursday because her TV Guide was bookmarked for that
page. You have heard the testimony which was that the
detective could not recall whether there were any markings,
that is, written markings in the book for the 15th. So you
can't really draw any conclusions from that.
If the State argues that you can, keep one thing
in mind, this detective took pictures. He took boxes of

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evidence. There were things in evidence that he tracks down
for weeks. He took a detailed description of every inch of
that apartment that he gave from the stand, but he didn't
seize the TV Guide. Don't let anybody stand here and try to
argue to you what that TV Guide contained. You will never
know. Which is why he told you he couldn't remember.
Now, the State is going to argue to you that
Kevin Wiggins did this murder during this span of time from
when he left the maintenance office at 4:45 and came back at
5:05, twenty minutes that Mr. Weinberg testified Kevin was
gone.
Now, we know that it took him five minutes to
walk to there and five minutes to walk back. That leaves ten.
We know that he did move the sheetrock, like he said he did.
That took some time. We know that he talked to Mrs. Lacs. We
know that he went back outside when the little girls left. He

was going outside with them. That took at least some moments
in time.
You can see the picture. Somebody ransacked
every inch of Mrs. Lacs' apartment. That was not accomplished
in the remaining seven or eight minutes that Kevin Wiggins was
over in that apartment building.
And what I really can't figure out is, if you
would kill someone at that time, why would you go back and
tell somebody, I was just -- if anybody turns up dead, I was

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there. What possible sense does that make? The State is
arguing to you that this is some kind of new alibi or
something, put yourself there, that way you can't possibly be
a suspect.
Ladies and gentlemen, Kevin Wiggins went and
moved the sheetrock because he thought he was doing something
nice for a new employer, and he needed a job. And he did it.
He did what he said he did.
They say to you, and have in their closing and
undoubtedly will in the rebuttal, state to you that he killed
Ms. Lacs obviously because he lied in his statement. This is
a stretch of the first degree.
Kevin committed and confessed to theft and credit
card offenses. He was not asked about murder. He was not
told he was being held for a murder. And he said nothing
about a murder. The most plausible explanation for why he
lied at all about the date or the time or the manner in which
he got the car and the cards is that he was covering for the
person that provided them to him. That's why.
They'll tell you that Kevin is a criminal type
because remember when they arrested him and booked him, they
found a glove in his pocket. But we know by agreement that

none of the substances spilled in that apartment, either on Ms. Lacs or in that bathtub, were found on that glove. There are fingerprints in that apartment, which would lead one to

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conclude, I would think, that the killer of Ms. Lacs was not wearing gloves.
And even stronger on that point, you have heard that the place was wiped down. You don't put on gloves and then wipe down the fingerprints you didn't leave. You try to wipe down fingerprints you are afraid you did leave because you are not wearing gloves. Don't let the State stretch that one.
In short, ladies and gentlemen, they'll be telling you when you hear rebuttal, believe what they say and don't believe what they show you. The end result of their analysis must be that you cannot be certain beyond a reasonable doubt that Kevin is the principal in Ms. Lacs' murder, and you must be sure.
I submit to you that mistakes have been made in this country in the past, and innocent men have been executed in this country in the past. Some of you may remember that there was a hit movie approximately a year ago about that very thing happening, a true story. And that the man that was the subject of that movie came perilously close to dying in an execution chamber for a crime that he was cleared of.
I say to you that when you go home tonight, be sure that your conscience will allow you to go to sleep peacefully, and that that peaceful sleep and quiet conscience will continue tonight, next month, next year, and forever.

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It has been said that there is one thing alone that stands the brunt of life throughout its course, a quiet conscience. If these facts nag your conscience, quiet it by voting for life.
Let me close by saying just a few things.
Closing arguments in a case like this are very difficult, because the defense only gets one chance to address you. And in that, we have to respond to what the State has said. We have to put forth our position, and we have to predict for you and respond to what we think the State will say in rebuttal, because they now get to speak to you. And theirs is the last voice that you will hear from the lawyers in this case.
But when you go back to the jury room to deliberate, please let my voice be heard in your mind. Listen for the things I have said. Remember my voice, and remember and hear my plea to your conscience.
And there is one other reason why it is so hard for defense attorneys to do this. You think to yourself when you stand before the twelve who decide your client's fate, what do you say to argue for life for a person who didn't commit the crime. Thank you.

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MS. BROBST: Thank you, your Honor. May it please the Court, Madam Forelady, members of the jury, I would like to reiterate Ms. Coffin's statements to you. We do very much appreciate your agreeing to undertake the job which you have agreed to do.
I would also like to reiterate another thing she said to you. Probably the most important thing you brought

24 into the courtroom over the last week and especially today and
25 later on today is your common sense. I think you are going to

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1 find that's an important thing you all have and something you
2 are going to have to use when you apply it to the evidence in
3 this case.
4 I would like first to talk about mitigation in
5 this case. We agree, as it has been told to you a number of
6 times, and the form is premarked, the defendant has not
7 previously been convicted of a crime of violence. That is a
8 mitigating circumstance. You must find that and you must
9 weigh that against the aggravating circumstance in this case,
10 which is the murder occurred in the course of a robbery.
11 I would also like to briefly touch on Professor
12 Johnson who touched on --
13 MR. SCHLAICH: Objection, your Honor.
14 THE COURT: Sustained. That's not rebuttal.
15 MS. BROBST: Thank you, your Honor. Addressing
16 specifically some of the points that the defense made in his
17 closing remarks to you, when he said that it was illogical or
18 irrational that someone would murder someone in this fashion
19 for the few things that were obtained, the credit cards, the
20 orangish Chevette as it was referred to.
21 I would like to point out this was a crime of
22 opportunity. Mrs. Lacs was brutally murdered because the
23 defendant had the opportunity to do so, because she was
24 available to him as a victim.
25 And the reason that all that was obtained as a

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1 result of this brutal crime were a few credit cards, the keys

2 to an orangish Chevette, and an engagement ring which she
3 owned, because that's all Mrs. Lacs had of value.
4 Additionally, because the defendant committed
5 this murder alone, none of the larger items such as the
6 television set could have been removed and concealed on his
7 person when he left that apartment. It was stated that
8 perhaps this defendant is covering up for someone else. Why
9 would he still be driving that car on the 21st?
10 Well, the car was stolen during a murder. That
11 is simply true. If the defendant were covering for someone
12 else, the car was no less stolen in the murder, and the fact
13 he is still driving it on the 21st does not indicate he isn't
14 guilty of this offense.
15 In addition, I would like to point out that Mrs.
16 Lacs was a widow. She lived alone. There was no way the
17 defendant could have known that she had even been found at
18 that time. She could have still been alone, lingering in the
19 apartment in the tub by the 21st. There was no way that
20 anyone could have known that that was no longer the case.
21 Now, the defense counsel has also asked you to be
22 able to live with this decision, and I hope that you will be
23 able to live with this decision, but, you know, somebody
24 else's life was at stake in this case. And I would like to
25 just bring up Florence Lacs for a moment, and ask you to also

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1 consider her, her life, and her unnecessary --
2 MR. SCHLAICH: Objection.
3 THE COURT: Overruled.
4 MS. BROBST: -- and really meaningless death when
5 you deliberate. And consider her as well as the defendant,
6 who you should also consider.
7 Now, when you all came to court last Thursday

8 knowing that you had been asked to sit this month as jurors,
9 you didn't ask to make this decision. You didn't hope that
10 you would be selected for this jury. But you agreed to do so.
11 You agreed to do your civic duty in this case and you accepted
12 this responsibility.
13 Now, your responsibility in this case is to look
14 at the evidence and to follow the judge's instructions, and to
15 reach a just verdict based on the law and the evidence.
16 That's what your responsibility is in this case. And give it,
17 if you would, please, your careful consideration.
18 Now, when you do retire to deliberate, which you
19 will do in just a few minutes, I would ask you to use the form
20 and start at the beginning. And start with Section I,
21 question number 1 as a way to get started on making this
22 important decision, realizing as you do that the defendant has
23 been convicted of first degree murder and robbery.
24 And to reiterate what Ms. Coffin said, your
25 decision is to decide whether in the first instance he is a

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1 principal in the first degree, whether it was he who caused
2 her death.
3 Then to go on to consider whether the death
4 occurred in the course of a robbery, which she explained to
5 you. Now, the defense on this point mentioned the
6 fingerprints, the five fingerprints which the Baltimore County
7 Crime Lab was unable to identify. Please recall that
8 testimony. It was the testimony of Detective-Sergeant Butt,
9 who stated that those prints were not identified to anyone
10 whose prints were submitted. Now, that includes Mrs. Lacs.
11 Now, we know for a fact that Mrs. Lacs was in
12 that apartment. So the fact that the prints were not
13 identified doesn't mean that they weren't someone's who was

14 there, specifically Mrs. Lacs' prints.
15 Additionally, the defendant was apprehended with
16 a glove in his pocket. One of the detectives testified that
17 there were marks in the apartment with water dots, such as you
18 would find if you removed a glass from a dishwasher. I think
19 that's very important when you consider there were also wet
20 towels found at various inconsistent places in the apartment
21 and the fact that the defendant was apprehended with a glove.
22 The defendant had the opportunity. The defendant
23 had the property. And he is seen in the hallway with Mrs.
24 Lacs the last time that she is seen alive by anyone other than
25 the defendant.

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1 Now, again, we don't know exactly what happened
2 or in what order. We do know that she is alive around five,
3 and by 7:30 p.m., he has her property. Sometime between then,
4 between those two times, she is murdered by the defendant and
5 we know it is him because he knows to lie later about the
6 date, when he is apprehended in that car, and offers his
7 so-called innocent explanation for how he came across the car
8 The medical evidence in this case, if I may characterize it
9 for you, from the defense expert, Dr.
10 Comparini, was at thirty-six hours certain things had taken
11 place. Rigor mortis has dissipated and livor is set. But she
12 told you that that continues, that continues in time until two
13 or three days, at one time she testified. And your
14 recollection of the testimony controls, but she said sometimes
15 toward the end of the week, that those two things remain
16 constant.
17 We can't tell from the medical testimony alone
18 when Mrs. Lacs was murdered by the defendant. We have to use
19 our common sense and look at the things that we do know, the

20 black notations that Mr. Schlaich drew for you, the things
21 that we know for sure. And the most compelling of those
22 things is that she has her things late that afternoon, she has
23 her keys, her credit cards, and she is in her apartment. And
24 by 7:30, 8 o'clock that night she doesn't have them and the
25 defendant does.

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1 And on that point, obviously these things were
2 taken from her. They were taken from her purse and her
3 wallet. Detective Crabbs testified that that purse and wallet
4 were on this bed, this bed and this apartment. On Thursday
5 before 7:30, when someone else has this property, when someone
6 else has the car, and the credit cards, and the car keys, and
7 the engagement ring, it looked like this.
8 Now, Mrs. Lacs did not go to bed that night after
9 this had been done to her apartment to be killed sometime
10 later in the week. That didn't happen. When the property was
11 stolen, and this is what happened when that property was
12 stolen, her apartment was tossed. It was ransacked.
13 And the reason that we know Mrs. Vassar is
14 mistaken about that phone call is Mrs. Lacs didn't get up the
15 next morning and call her and say, how are you doing, I've got
16 to go back to the store, not after this had been done to her
17 apartment. That is just inconceivable. People just don't
18 live this way, with their apartment in this condition. And
19 when the apartment got in this condition, because of the
20 robbery, when the property was taken, this was done.
21 When you make your decision in this case, you are
22 going to be asked whether the aggravating circumstance in this
23 case, the fact of the robbery, outweighs the mitigating
24 circumstance, which is that he doesn't have a prior conviction
25 for a crime of violence. And what the State is asking you to

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1 do is decide what is the appropriate sentence for what he did.
2 We're asking you to consider his crime. Look at
3 what he did. And when you weigh that in this case against
4 what you know about his background, the appropriate sentence
5 is death. Thank you very much.
6 MR. SCHLAICH: One second please, your Honor.
7 THE COURT: Ladies and gentlemen, at this time,
8 the defendant, Mr. Wiggins, will exercise his right of
9 allocution. Mr. Wiggins?
10 THE DEFENDANT: Ladies and gentlemen of the jury,
11 it has been hard for me to know what to say to you. I don't
12 know how to plead for my life.
13 I am sorry about what happened to Ms. Lacs and I
14 feel for her and her family. But I did not kill her. I
15 should not have used the things that did not belong to me
16 because I know that was wrong, and I am ready to go to jail
17 for that.
18 I am so upset right now about what is happening.
19 I don't know if they were right about this, my lawyers, wanted
20 me to get up and speak, but I've been going through a lot at
21 the Detention Center, and I'm just really upset.
22 But I do say this. I did not murder Ms. Lacs. I
23 can't believe that the State wants you to give me the death
24 penalty. And they laugh about it in the courtroom. It makes
25 me feel like my life means nothing.

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1 I am not a troublemaker, and I don't hurt people,
2 and have no convictions. I have tried to keep a job and a
3 place to live, but that has not been easy for me because I
4 haven't finished school. And everywhere I go they ask for a

5 degree in this and a degree in that, and I don't have it. And
6 I had to come out of school because I had to support myself
7 because my mother left me on the doorstep.
8 I would just like to thank you for listening to
9 me, and I would like to thank Carl and Michele Nethercott for
10 respecting me and believing me, and hanging in there with me
11 because I have been given a hard time because I've been going
12 through a lot. Thank you.

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3 (Whereupon, the jury began deliberations at 12:24
4 p.m.)
5 (Discussion had off the record.)
6 (The jury returned to the courtroom at 6:38 p.m.
7 and the following ensued:)
8 THE COURT: Ladies and gentlemen of the jury,
9 have you reached a verdict?
10 THE FORELADY: Yes, sir, we have.
11 THE COURT: Who shall say for you?
12 THE FORELADY: I shall.
13 THE COURT: And, Madam Forelady, how say you with
14 respect to Section I, whether the Defendant was a principal in
15 the first degree to murder, do you find that proven or not
16 proven?
17 THE FORELADY: Proven.
18 THE COURT: I'm sorry?
19 THE FORELADY: Proven.
20 THE COURT: And as to Section II, how do you find
21 with respect to whether the Defendant committed the murder
22 while committing or attempting to commit robbery, proven or
23 not proven?
24 THE FORELADY: Proven.

25 THE COURT: And as to Section III, Item 2,

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1 mitigating circumstance, 2, how do you find as to (a), (b) or
2 (c)?
3 THE FORELADY: (b).
4 THE COURT: As to 3, (a), (b) or (c)?
5 THE FORELADY: (b).
6 THE COURT: As to 4, (a), (b) or (c)?
7 THE FORELADY: (b).
8 THE COURT: And as to 5?
9 THE FORELADY: (b).
10 THE COURT: And as to 6?
11 THE FORELADY: (b).
12 THE COURT: As to 7?
13 THE FORELADY: (b).
14 THE COURT: And as to 8(a)?
15 THE FORELADY: No answer.
16 THE COURT: As to 8(b)?
17 THE FORELADY: His background.
18 THE COURT: As to Section V, how do you find, yes
19 or no?
20 THE CLERK: It's IV, Judge.
21 THE COURT: And whether the State has proven by
22 a preponderance of the evidence the aggravating circumstance
23 marked proven in Section II outweigh the mitigating
24 circumstance in Section III?
25 THE FORELADY: Yes.

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1 THE COURT: As to Section V?
2 THE FORELADY: We unanimously determine the

3 sentence to be death.

* * * *

In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
(Post Conviction Hearing)
January 7, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

* * * *

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19 Mr. Siegel: [WITNESS: HANS SELVOG]
20 Q Mr. Selvog, what is your profession?
21 A I'm a licensed clinical social worker.
22 Q I'm showing you what -- Your Honor, I don't know
23 what system you wanted to use here.
24 THE COURT: Mark them in and do them in
25 sequential numbers.

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1 MR. SIEGEL: Could I recommend that we perhaps
2 use the letters P C before each number or letter to identify
3 that that is a post conviction proceeding?
4 THE COURT: That will be fine.
5 MR. SIEGEL:
6 Q Giving you what I have marked as PC-1, Mr.
7 Selvog, do you recognize that?

8 A Yes.
9 Q What is PC-1?
10 A This is my resume'.
11 Q Now, Mr. Selvog, you mentioned a moment ago you
12 were a certified licensed social worker. When did you become
13 certified and licensed?
14 A In 1990.
15 Q How does one become certified and licensed as a
16 social worker?
17 A Following a graduate degree in social work you
18 have to have two years of weekly supervision that is -
19 documented and that can be presented to the State licensing
20 board and then pass an oral examination, written examination
21 and then the state office assigns you a license.
22 Q Okay. Can you give us your educational
23 background?
24 A I have a Bachelor's Degree in social work, in
25 1976, and a graduate degree in social work in 1986.

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1 Q Okay. From where are those degrees?
2 A The first one from Bethel College in Saint Paul,
3 Minnesota and the second was Virginia Commonwealth University
4 in Richmond.
5 Q What is your current position?
6 A I'm on staff with the National Center on
7 Institutions and Alternatives where I'm one of the primary
8 therapists there and do a number of the forensic clinical
9 assessments out of the office.
10 Q Can you for starters describe the National
11 Center on Institutions and Alternatives for the Court?
12 A We are a private nonprofit agency that provides
13 direct services to both the criminal justice and mental health

14 systems. I primarily have been involved in providing services
15 in forensic social work. I ran our office as the
16 administrator in Atlanta for three years and then have been
17 here in northern Virginia since 1989 under my new duties.
18 Q What did you do down in Atlanta specifically?
19 A I ran the office, which comprised mainly of
20 providing alternative sentencing cases to the courts in felony
21 cases and also provided social histories in capital cases and
22 we also received a grant in my office there to act as a
23 clearing house on mitigation development in capital murder
24 trials.
25 Q Okay. And now that you work in Alexandria, do

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1 you work on specific cases there?
2 A Yes, I do.
3 Q Could you describe that work?
4 A We primarily work with felony defendants
5 fashioning alternative sentences and also providing
6 corroborative social histories in capital cases and also
7 providing direct therapy to victims of sexual trauma and
8 perpetraitors of sexual abuse.
9 Q What sort of work did you do before your
10 position at NCIA?
11 A I have experience as a substance abuse counselor
12 for the chronically -- chronic cases in Saint Paul, Minnesota.
13 I have done a lot of work with juvenile delinquents in the
14 states of Minnesota, Illinois and Virginia. Also worked with
15 the chronically mentally ill in Virginia, people from --
16 people with problems from schizophrenics to bi-polar
17 disorders. And I also have done a variety of individual and
18 group therapies with teenagers and their families.
19 Q Now, specifically, Mr. Selvog, have you done any

investigative work into defendants or petitioners' backgrounds in capital cases?
A Yes, I have.
Q And could you describe that work for us?
A Since 1986 I began preparing and compiling social histories for defendants in capital cases for the

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defense. I'm usually appointed through the courts to provide these extensive investigations and I detail the results of my interviews with the defendant and his family and after researching the records into a report that are submitted to the court.
Q Do you also attend or conduct any seminars on this sort of work; keep abreast of the educational developments?
A Yes, since my office in Atlanta in running the clearing house there I was invited in 1988 to speak on mitigation development at the Airlie House conference in Warrenton Virginia, which is an annual conference put on by the NAACP. I also have presented this information for continuing legal education seminars in the states of Louisiana and Virginia.
Q Okay. Mr. Selvog, do you have any clinical experience with victims of abuse?
A Yes, since 1989 I have been assistant administrator and one of the primary therapists in the Augustus Institute, which is a direct mental health out-patient mental health clinic of the NCIA and our predominant population that we deal with are victims of sexual trauma and perpetraitors of sexual abuse.
Q Could you discuss a little more specifically your clinical experience with these victims of sexual abuse

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that you just mentioned?
A Well, primarily we help people who have suffered sexual abuse in traumas, both victims who are trying to repair their lives -- we do extensive therapy both individually and group and also perpetrators who 90 percent of them have also been sexually victimized, and we deal with their victimization and acting out behaviors and try to prevent recidivism in those cases and try to repair those lives as well.
Q Have you ever been admitted as an expert, Mr. Selvog?
A Yes, I have, I have qualified as an expert in the area of social work in capital cases approximately ten occasions in both the state and federal level.
Q Any experience in Maryland as an expert?
A Yes, I have been qualified in Maryland approximately six cases.
Q Could you give us the range chronologically, the first case to the last case?
A Beginning in 1989 to the present is when I have been qualified as an expert in Maryland.
Q So those six cases were in Maryland?
A Yes.
Q And what field exactly were you qualified as an expert?
A In the field of social work.

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MR. SIEGEL: Your Honor, at this time I move to admit Mr. Selvog in the field of social work.
THE COURT: Any questions?
CROSS EXAMINATION (On qualifications)

MS. BROBST:
Q You have stated that your degrees are a Bachelor's Degree in social work and Masters in social work, is that correct?
A That's correct.
Q You do not have a medical degree, is that correct?
A Yes.
Q You are not a psychiatrist?
A No.
Q Nor are you a psychologist.
A No.
Q Is it your understanding that someone with a Bachelor's Degree in social work and masters in social work, is that correct?
A That's correct.
Q You do not have a medical degree, is that correct?
A Yes.
Q You are not a psychiatrist?
A No.

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Q Nor are you a psychologist.
degree with a Masters and Bachelor's in social work may diagnose?
A Yes.
Q That is your understanding?
A That --
Q You may opine as to a diagnosis?
A Yes, if you are licensed clinical social worker you may.
Q What kind of a diagnosis can a licensed clinical

social worker opine as to?
A A diagnosis in terms of what disorder, medical disorder a patient my be suffering from.
Q You could state that someone was suffering from schizophrenia?
A Yes, I could. That is the purpose of a license in order to submit to insurances for payment. That is the whole purpose of it. That is one of the purposes of the license.
Q So I'm now given to understand that a licensed clinical social worker -- are you licensed in the State of Maryland?
A No, I'm not.
Q Where are you licensed?
A Virginia and Washington, D.C..

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Q Is it your understanding that a licensed clinical social worker in the State of Maryland can diagnose someone's mental disorder?
A I can't say for sure in the State of Maryland.
Q You have no knowledge of that?
A I would -- I just can't state for sure. I would assume that you would; that it would be the same in each state.
Q It is your testimony that you can in Virginia?
A Yes.
Q Are you considered an expert in the area of psychological testing; can you administer IQ tests?
A No, I cannot.
Q How about those Rorhschack test?
A No, I cannot.
Q Wouldn't be it be more accurate to state that

17 actually your experience would be that of collecting
18 information regarding somebody's background?
19 A That is an accurate statement, yes.
20 MS. BROBST: Nothing further as to
21 qualifications, Your Honor. I may have objections as to
22 various opinions as they come up.
23 THE COURT: Well, my recollection of the law is
24 that he is absolutely not allowed under Maryland law to
25 express any type of diagnosis as far as anything involving DSM

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1 III or anything along there. So I don't think it is any big
2 surprise at this time what objection you will make.
3 MS. BROBST: Thank you.
4 THE COURT: How many years of education do you
5 have? Four years of college?
6 THE WITNESS: Four years undergraduate and two
7 years graduate.
8 THE COURT: What kind of courses did you take in
9 graduate school?
10 THE WITNESS: A whole range from the clinical
11 diagnoses --
12 THE COURT: You never took any pharmacology?
13 THE WITNESS: No, sir.
14 THE COURT: So you don't know anything about
15 drugs?
16 THE WITNESS: That's correct.
17 THE COURT: What did you take in college and what
18 do you feel should allow you to express an opinion as to a
19 diagnosis of a psychological or psychiatric condition?
20 THE WITNESS: The license requirements, in order
21 to become a licensed clinical social worker, that is one of
22 the minimum requirements tested for is your knowledge in order

23 to make these appropriate --
24 THE COURT: What courses did you take? Do they
25 allow you to express that opinion in the State of Virginia?

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1 THE WITNESS: Yes, if I wish to they will allow
2 me to make a diagnosis.
3 THE COURT: Gentlemen, did you call him to
4 express any type of psychological or psychiatric opinion in
5 this case?
6 MR. SIEGEL: No.
7 THE COURT: That takes care of it then. We don't
8 have to worry about it. Go ahead.
9 MR. SIEGEL: He has been admitted then?
10 THE COURT: He has been admitted. I certify him.
11 DIRECT EXAMINATION (Continued)
12 MR. SIEGEL:
13 Q Mr. Selvog, in that case, based on your
14 experience and expertise in investigative and mitigational
15 work in capital cases, what should capital case lawyers do
16 from the outset of a capital case with respect to that
17 defendant's background?
18 MS. BROBST: Objection.
19 THE COURT: Sustained. Ashley, find me in here
20 what Judge Hinkel found him guilty of in the green sheets.
21 Q Mr. Selvog, in this case what did we ask you to
22 do?
23 A You asked me to prepare a full corroborative
24 social history on the defendant that includes documented and
25 corroborated information through interviews about his life.

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Q Could you go into a little more detail on what exactly you did to comply with our request?
A Yes. What I did was interview the defendant, interview the many family members that we could locate about the defendant's life, reviewed records pertaining to the defendant which included his foster care records, medical records and school records.
Q Okay. And who exactly did you interview in this case with respect to the defendant?
A Interviewed the defendant, Kevin Wiggins on several occasions, his mother, his three sisters, his maternal aunt, maternal cousin and another maternal cousin.
Q Okay. What records exactly did you review?
A Primarily relied on the Maryland social service records and some of his medical records from Baltimore area hospitals.
Q Okay. And did that effort -- what did that effort culminate in?
A A report that I prepared, "Chronological merit of Kevin Wiggins Social History".
Q I'm showing what you I have marked as PC-2. Do you recognize that document?
A Yes, I do. This is the report that I prepared for you.
MR. SIEGEL: Your Honor, I move that we admit Mr.

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Selvog's report as exhibit PC-2.
MS. BROBST: Objection.
THE COURT: Well, in Maryland once she objects you need to tell me more about how he went about gathering

this information. In Federal Court you can just throw it all in and then cross examine him. We don't do that here.
MR. SIEGEL: Okay.
THE COURT: You need to tell me more, particularly if there is any conclusions here. Are there any conclusions in this report or is it just a factual summary?
Q Mr. Selvog, have you drawn any conclusions from your investigative work?
A Yes, I have concluded on --
MS. BROBST: Objection.
THE COURT: The answer is yes. Where are the conclusions in the report? What page are they on?
MR. SIEGEL: They are at the very end of the report on the last three pages, beginning with Page 22, I believe.
THE WITNESS: Page 24, summary of conclusions.
THE COURT: Do you have any objection to anything on page 24, Ms. Brobst? Seems to me that --
MS. BROBST: I object to the report of the U.S. Department of Justice, National Institute of Justice.
THE COURT: Well, you don't doubt that there is

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such a report, do you?
MS. BROBST: No, sir.
THE COURT: I understand that Maryland says that I'm supposed to take notice of governmental records. Since you don't object to I will overrule your objection. Anything on page 25?
MS. BROBST: I object to the what I consider to be diagnoses opinion in the first paragraph after the report to which the Court has overruled my objection, beginning with the "developmental problems" and concluding with "vulnerable

and tender years."
THE COURT: Well, you are certainly entitled to know the basis of that before he expresses an opinion. But it seems to me that he is able to do that as a licensed social worker. So we will put a note there about the basis.
MS. BROBST: I'm not really objecting to the basis in candor. I'm objecting to his qualifications to state that opinion.
THE COURT: I think a social worker can express opinions as to developmental problems. What is next?
MS. BROBST: The following paragraph. "Although intervention." On the same ground that he is not qualified.
THE COURT: Overruled.
MS. BROBST: I would object to the inclusion of Lloyd Demause's opinion, since I have no idea --

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THE COURT: Where is that?
MS. BROBST: The next paragraph which is quoted into the next page. I have no opportunity to cross examine Mr. Demause who wrote "The Universlity of Incest" and his conclusions contained therein.
THE COURT: Well, you know, you can find anybody today that will write and express an opinion about anything. My God. It is unbelievable. But I'm reading this and it doesn't seem to me to be anything more, Ms. Brobst, than what is generally recognized and what you can find written by a decent reporter for the Baltimore Sunpaper or the New York Times any day. What do you think about that?
MS. BROBST: I think, Your Honor, that my point is merely that it is unfair to introduce the opinions of others merely because this particular witness has contained them in his written report.

THE COURT: I understand that. What I'm saying to you is that this is "stuff" that is generally accepted and reported as being accepted in the community in the New York Times and the Baltimore Sunpaper and the Washington Post any day. So if that is all it is and it is nothing other than generalities, I think I will let it in. Overruled.
MS. BROBST: For the same reasons I object to the following paragraph regarding the opinions of Doctor Marie Fortune and her estimates contained in the report of Mr.

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Selvog. I have no opportunity to cross examine her. He is in effect introducing her opinion in his report. I don't think if it were his opinion he would be qualified to make such an opinion for those reasons.
THE COURT: That kind of worries me. That is getting to be something a little bit too specific. I need to know more from this gentleman before that comes in. Anything else?
MS. BROBST: I object to the last paragraph which begins on page 26 and concludes on page 27 regarding this witness' diagnosis of the defendant Kevin Wiggins with respect to --
THE COURT: I will hold that --
MS. BROBST: -- psychological damage.
THE COURT: -- until I hear some basis for that opinion.
MS. BROBST: Just so that we --
THE COURT: The rest of it is generalization which I think that I can say is what has been reported in our major newspapers and our major magazines and is generally accepted in the community and reported as such involving the trauma of abuse for individuals.

23 So I do not see anything in any of this that is
24 not generally reported and not generally accepted and not
25 generally portrayed in any of this. It seems to me that all

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1 of the media and the magazines and the writers are in general
2 opinion that this is so.
3 The only thing that I feel that you are correct on
4 is whoever this Marie Fortune is and what type of a doctor she
5 is, her statement that ninety percent of all sexual abuse
6 victims are victimized by somebody they know, I certainly
7 don't think that opinion should be able to be expressed
8 without some type of basis because I could get Donald Fortune
9 and Tony Fortune and Zeke Fortune to write another article
10 saying it is 10 percent or 15 percent. I don't mean to be
11 discourteous to anyone, but everybody knows everybody is
12 writing articles saying everything today. I don't know if
13 that is generally accepted.
14 Also, with respect to the conclusion here that
15 Kevin Wiggins bore the secrets of sexual victimization, I will
16 sustain the objection in that regard until I hear a basis that
17 would allow him to express that opinion.
18 With regard to the rest of it, it being "generally
19 accepted", it is in.
20 MS BROBST: Thank you.

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11 THE COURT: You know what the parameters are.
12 Except for those two points I have overruled her objection and
13 allowed everything in.
14 MR. SIEGEL: May I continue examining on his

15 basis for those conclusions, for example the fortune report?
16 THE COURT: Yes.
17 MR. SIEGEL:
18 Q Mr. Selvog, what is the basis for your
19 conclusion that you end up with on page 26 of your report that
20 Kevin Wiggins bore psychological and abuse scars into his
21 adulthood?
22 A The basis for those conclusions are or is the
23 evidence from my interview with his family and himself and the
24 documents from Social Services. Did you want a more specific
25 answer?

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1 Q Please.
2 A The family recalls consistently the abuse that
3 Kevin Wiggins and his sisters suffered from their mother,
4 neglect and abandonment that they remember as well as
5 documented in the social service records that transpired for
6 approximately the first five years of Mr. Wiggins' life and
7 then it documents his foster care history in a number of
8 evaluations, school reports that also document the various
9 symptoms of psychological trauma throughout his adolescence.
10 And that in effect is the basis for that opinion at page 26.
11 Q Okay. Now, in your work, your clinical work
12 with victims of sexual abuse, could you tell us exactly what
13 conclusions you generally derive as a professional in this
14 area from that work?
15 MS. BROBST: Objection.
16 THE COURT: I didn't understand that. Could you
17 ask him that again?
18 Q Mr. Selvog, could you more generally describe
19 your work as a clinical social worker with victims of sexual
20 abuse? Tell us what you do.

21 A People come in with symptoms or troubles. As a
22 therapist we do a social history, try to determine -- we
23 question them thoroughly on what they are experiencing and we
24 determine what symptoms are present and we determine what the
25 basis for those symptoms might be in order to alleviate those

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1 symptoms both short-term and long-term through accepted
2 individual therapy and group therapy practice.
3 Q Could you explain that practice a little bit?
4 What are those accepted practices that you just referred to?
5 A By providing a therapeutic relationship that
6 would allow someone to uncover history of trauma or abuse and
7 to talk about that, to work through those issues; to try to
8 resolve those experiences in a way that will not interrupt
9 their functioning; that they can have some resolution, some
10 finality to those damaging, developmental, abusive
11 experiences.
12 Q Okay. Could you contrast that work, if it is
13 different, with the work that is done by trained mental health
14 professionals, psychiatrists and psychologists?
15 A Well, social workers are also trained mental
16 health professionals. The difference between what a
17 psychiatrist and psychologist might do, from my opinion,
18 psychiatrist has a medical degree and can prescribe
19 medication; psychologists are licensed to test using objective
20 tests on clients. But essentially the therapy that goes on
21 between client and patient is very similar fundamentally among
22 social workers, psychologists and psychiatrists. The only
23 difference would be the particular model of therapy that they
24 use in their practice.
25 Q And for these victims of abuse that you counsel

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1 and work with in the way you have just described, do you
2 gather evidence from their past, their personal histories to
3 help you in this therapy?
4 A Yes, very similar to the same kind of process
5 that I described earlier about what I did in this case. We do
6 a very thorough social history which is probably the thing
7 that distinguishes social work profession from psychologists
8 and psychiatrists is doing -- it is the cornerstone of the
9 social work practice is the psycho-social history and being
10 able to assess someone's past and how it affects them today
11 and through that sort of process.
12 Q How long have you been counseling victims of
13 sexual abuse, Mr. Selvog?
14 A Since 1989.
15 Q As a rough estimate -- I know you don't have a
16 exact number here, but as a rough estimate how many victims
17 would you say you have worked with?
18 A A rough estimate would be one hundred and fifty
19 to two hundred.
20 Q Okay. And in the work that you have described
21 that you do on behalf of capital defendants and petitioners,
22 is this component, this therapy and personal history as
23 regards sexual abuse typically a component of it, of the work
24 you do and have done for capital defendants and petitioners?
25 A I would say yes, it is typically a component.

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1 MR. SIEGEL: Your Honor, I move that Mr. Selvog
2 at this time be admitted as an expert in social work as it
3 regards sexual abuse and its affects later in life.
4 THE COURT: Well, he already has been admitted

for that, sir. The question Ms. Brobst has is is he able considering his training to express the opinion that you wish him to express? Is it accepted in his profession that he be able to express that type of opinion? That is what she wants to know.
MR. SIEGEL: Okay.
Q Mr. Selvog, let's turn to the specific work you have done on behalf of Kevin Wiggins. You have already summarized your conclusions based on this work. Could you specifically tell me first of all when Kevin Wiggins was born?
A Kevin was born September 2nd, 1961 in Baltimore, Maryland.
Q Okay. And who were Kevin Wiggins' parents?
A His mother was Jean Wiggins. His father was Lester Evans, who was not married to Jean Wiggins but was -- it was an extra-marital affair that produced Kevin.
Q Did Kevin know his natural father?
A He knew of him but he really has never known him.
Q Okay. What sort of person then was Kevin Wiggins' mother?

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A She came from a family of five, I believe. She was an alcoholic, chronic alcoholic prior to the time Kevin was born up to the present.
Q Okay. What were the effects of this alcoholism on Jean Wiggins?
A The effects of her alcoholism as related to Kevin was that she did not provide adequate care to Kevin and his two older sisters; leaving them for days, sometimes weeks at a time. Before she left the apartment she would lock the kitchen so that the children couldn't get in to get food and

the children with the help of the oldest sister, India Evans, would have to beg for food from the neighbors, from relatives, pick food from trash cans, hide food in anticipation of the mother leaving the home to prepare later, which usually consisted of rice and milk and cereal.
And that when the mother did come home she was usually in a drunken state or very disheveled state so that she was not in the state of mind to provide adequate nurturing, often had company when she came home, was drunk with the company, put the children in another room while they had sex and partied in the next room. In fact the children recall being in the bed when Mrs. Wiggins had sex with some of her relationships as she brought home, witnessing that sex and also witnessing her mother's nakedness.
Q Mr. Selvog, to get back for just a second to the

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locked kitchen cabinet that you mentioned, did the children go hungry because of this?
A Yes, they went hungry often for days. If it wasn't for the kindness of someone down the stairs or India going out and trying to find food, they often went hungry, which left Kevin sometimes eating paint chips and just having water to drink to satisfy his hunger.
Q Did Mrs. Wiggins have a tendency to violence when she would return home?
A Yes, she would get very angry if she found that the children had found some way to get into the kitchen and take the food and would often beat them. When she did beat them she used objects, belts, straps, anything she could get ahold of, shirts, furniture. A large amount of the abuse, in particular, went to India, the oldest girl, who was the most responsible because she was oldest. But Kevin saw this abuse

17 towards his sister and he also experienced similar abuse from
18 his mother.
19 Q Okay. And what was Kevin's reaction to these
20 beatings?
21 A Well, they were very painful. They left him
22 confused, they left him frightened constantly. In that type
23 of environment where you have chronic alcoholic parent,
24 caregiver, the environment is unpredictable; the environment
25 is hostile. So there is constant fear. The effect and the

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1 symptoms of which Kevin reports and the sisters report is
2 finding ways to deal with that sort of trauma by blanking out,
3 actually a number of defenses, but blanking out, trying not to
4 feel, trying not to think about anything; sort of
5 depersonalization sort of experiences by looking on these past
6 memories of the abuse as they were occurring or after they
7 occurred as happening to someone else; being -- trying to
8 avoid the feelings of those experiences by -- in one instance
9 in particular Kevin wanted to fly, fly out of the window to be
10 free and his sisters had to hold him back.
11 Q Did Kevin's sisters also abuse Kevin?
12 A Yes. India, the oldest, who was under great
13 pressure to provide care for her siblings at age, 8, 9, 10, 11
14 years old, after growing tired of Kevin's crying for his
15 mother, crying of his hunger and just being confused, that she
16 would in her frustration with the situation, in her anger
17 would take Kevin into the bathroom, pull his pants down and
18 put him over her lap and with a pin, safety pin that she
19 straightened out, would stab him in the buttocks in the pin
20 holes until there was blood oozing out of the pin holes and
21 hit him in the face telling him to shut up and quit crying and
22 she did this until he stopped crying. This occurred on many

23 occasions.
24 Q Okay. What was the most serious incident that
25 Kevin suffered at the hand of his mother?

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1 A The most serious incident was an incident in
2 which the family recalls Kevin was playing with matches, was
3 caught by his mother who was extremely angry at him playing
4 with matches and she put his hands on a burner after heating
5 the burner up, forced his hands and held them against the
6 burner, burning his thumbs.
7 Q Did Kevin require medical attention for this
8 incident?
9 A Yes, he did require medical attention, but he
10 did not receive medical attention immediately. It is unclear
11 as to when, whether that evening or later. He didn't receive
12 it right away because the mother refused to get him medical
13 attention. She wrapped his hands and then because he kept
14 crying she unwrapped them and put them in icewater. She
15 rewrapped them after unwrapping them and she just persisted in
16 not getting him to the hospital.
17 THE COURT: How old was the young man at this
18 time, sir?
19 THE WITNESS: Approximately five years old.
20 THE COURT: Okay.
21 Q After this incident that you have described of
22 the burning, Mr. Selvog, did Kevin's natural mother retain
23 custody over Kevin and the other children?
24 A Yes, she did retain custody for sometime. It
25 was in maybe a year later in 1967 that it was finally reported

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and the children were removed from her custody.
Q What exactly precipitated their removal in 1967?
A The neighbor downstairs finally reported that she had left the children unsupervised for several days. There was an investigation by Social Services at that time and there was a founded case of abandonment and neglect. So they were placed as wards of the State in February of 1967. He was approximately six years old at that time.
Q Where did the children go then in February of '67 after being declared wards of the State?
A May I refer to my report just to be specific on the name of the foster home?
Q Sure.
A They were placed in emergency foster care with a Mrs. Tinkler.
Q How long did they stay with her?
A For approximately a year.
Q Okay. And what was the Tinkler home like for the children?
MS. BROBST: Objection. Basis.
THE COURT: Tell us, please, who you interviewed to find that information out?
THE WITNESS: Interviewed Kevin and his two sisters.
THE COURT: Sir, these interviews that you

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conducted and the way you went with them, is this the way social workers go about their business of acertaining this information?
A Yes, sir.

THE COURT: And is this accepted as a standard in your profession and trade in that situation?
A Yes, it is.
THE COURT: Okay. I don't see on this computer situation that I have -- did they do a social work interview in the trial of this case? I'm looking at my own computer statement as to what happened in this trial. There was a presentence report, correct?
THE WITNESS: Parole/probation report, yes, sir.
THE COURT: And they did some type of a background on him, right?
THE WITNESS: Yes, sir.
THE COURT: Did you base any of your decision on any of that background also? Did you review that, sir?
THE WITNESS: Yes, I did review it. I don't think I relied much at all except for maybe factual basis of maybe employment from that particular record.
THE COURT: All right. I have just got here on my computer screen when the Wiggins case came out, even before I was assigned it, all the rundown and points that I made. I have other cases on here too. I was looking for that. I

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didn't see anything mind boggling. Go ahead.
Q Mr. Selvog, let me interrupt for a second the history of Kevin Wiggins and ask you more general questions. Do social workers like yourself base opinions, commonly, generally base opinions on the sort of social history and information and interviews and records that you mentioned you have examined in this case?
A Yes.
Q That is a commonly accepted technique among social workers and professionals like you?

11 Yes. Even psychiatrists and psychologists.
12 Q Okay. Let's return then -- I think you had said
13 that in 1967 the children were placed in the Tinkler home and
14 I had asked to you describe what the Tinkler home was like for
15 the Court. Could you do that, please?
16 A Mrs. Tinkler was very religious. They went to
17 church most every evening, all day Saturdays and Sundays.
18 Church during the week was sometime after dinner until late
19 into the night, sometimes midnight. Mrs. Tinkler was very
20 strict on the children and punished them harshly at times.
21 Charlene, for sucking her thumb, Mrs. Tinkler would bite her
22 tongue. The children also received marks from Mrs. Tinkler
23 pinching them and twisting the flesh as a sort of punishment.
24 Q Why were they removed from the Tinkler home?
25 A The children recall that they were removed

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1 because during the physical examination this abuse was found
2 out.
3 Q By whom was the abuse found out?
4 A By the medical doctors who were doing routine
5 examinations on the children.
6 Q And where did the children go after being
7 removed from the Tinkler home?
8 A Placed with a Mr. and Mrs. Miner in March of
9 '68.
10 Q How long did they remain with the Miners?
11 A Approximately nine years.
12 Q Until 1977?
13 A Yes, at least Kevin stayed during that time. I
14 think his sisters left maybe a year, two earlier than he did.
15 Q Okay. What sort of person was Mrs. Miner?
16 A Mrs. Miner was described in the record as a very

17 authoritative, militaristic mannered woman; very controlling
18 person who admitted to sexually -- I'm sorry. Admitted to
19 physically abusing the children, disciplining them with straps
20 and belts.
21 Q Did she ever beat the children with something
22 other than straps and belts?
23 A Yes, with her hand.
24 Q Okay. And which of the children received these
25 beatings?

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1 A All of the children received the beatings.
2 Q Okay. Was Mrs. Miner intrusive? Did she allow
3 the children their privacy or do you know?
4 A Later when Kevin became a teenager he reported
5 that Mrs. Miner would often walk into the bathroom when he was
6 using the bath and this upset him very much and caused some
7 problems in the home.
8 Q In addition to the physically abusive behavior
9 you have described on behalf of Mrs. Miner, what was Mr. Miner
10 like?
11 A Mr. Miner was described by the children as a
12 depressed man. He worked out of the home quite a bit. He
13 often -- he was an alcoholic and had a problem with drinking.
14 He was threatening to Mrs. Miner on many occasions. Several
15 occasions brandishing a weapon, a gun at her while the
16 children were huddled in front of Mrs. Miner, frightening the
17 children.
18 He also became sexually involved with Kevin,
19 molesting him and raping him through digital penetration and
20 penile penetration within a year or two of his placement there
21 until Kevin's teenage years.
22 Q How did this first come about?

23 A Mr. Miner would isolate Kevin or get him alone
24 in the basement and then begin wrestling with him and then
25 attempt to fondle him and then would fondle him and would ask

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1 Kevin to allow him to Vaseline his finger and put it into his
2 anus and tell him that he would be his little man if he could
3 do this and that he would help Kevin to relax, taught him how
4 to breathe on several occasions so he could take the finger
5 in.
6 On several occasions he attempted to penetrate
7 Kevin with his penis. It hurt too much and he stoped at that
8 time. Sometimes this happened every day for days at a time.
9 Sometimes once a month.
10 Q And what was the time period when this was going
11 on; what years was it going on and how old was Kevin at this
12 stage?
13 A Approximately the range would be from 1969, '70
14 to 1976, '77.
15 Q Okay.
16 A That would be ages eight, nine, to fourteen,
17 fifteen.
18 Q Did Mr. Miner sexually abuse the other children
19 as well?
20 A The sisters report that he often as a way of
21 discipline asked Charlene to strip her clothes off and then he
22 would gawk at her. She was more sexually developed than her
23 cousin India -- I mean her sister India and this is why it
24 happened to her most often. Then he would spank them also
25 while they were undressed.

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1 Q Did Mr. Miner's abuse of the sort you described
2 towards Kevin cause any reactions in Kevin?
3 A Kevin was very confused. He did try to inform
4 Ms. Miner about it when it first started to occur. She denied
5 it, called him a troublemaker and a liar. It left him very
6 confused about himself, why these things were happening to
7 him, why Mrs. Miner wouldn't believe him; questions about his
8 identity; why Mr. Miner would want to have sex with him
9 because he is a male. At the same time Kevin was starved for
10 affection and needed affection and wanted to be close to Mr.
11 Miner, and this was a large reason why Kevin allowed this to
12 happen.
13 Q Did Kevin develop an inability to eat during
14 this period?
15 A Yes. Because of the confusion or at that time
16 he was unable to eat. He would stash food away in his pockets
17 from breakfast and dinner so that Mrs. Miner wouldn't get
18 angry with him. Eventually when he began to loose weight and
19 his ribs were showing he was taken to the hospital and they
20 were able to give him some medication to get his appetite
21 back.
22 Q Okay. Now, did case workers working with foster
23 children have occasion to evaluate Kevin during the time when
24 he was in the custody of the Miners?
25 A Yes, Mrs. Miner noticed several things that

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1 troubled her about Kevin; his eradic, sometimes bizzare
2 behavior. And she asked that he be psychologically evaluated.
3 So these psychological evaluations were done through social
4 services.

Q What were the results of these evaluations?
A Some of the observations were that Kevin was unable to dress himself --
THE COURT: What age are we talking about here, sir?
THE WITNESS: Talking about 1968, '69 and Kevin would have been seven, eight years old. He was unable to put his shoes on, put socks on inside out. Couldn't button his shirt. He was very lethargic in dressing and eating and doing most activities.
His memory, he was observed as his memory seems poor. He couldn't, when his foster mother asked him to do something, he was unable to carry out the task. He would quickly forget.
One of the most striking things in the record of the social worker was that they noticed that Kevin had difficulties distinguishing between fantasy and reality; that he described seeing camels or hallucinated seeing camels and that he was just a very disturbed young man because of these things. They also noticed that he was unable to concentrate or to keep his attention on things and that he would have

blank-out spells where he would be staring off into the distance for no particular reason. This was observed and reported from school officials to the evaluators also.
Q Okay.
A Could I add a couple things? And also the testing showed that he was in the borderline range of mental retardation IQ in 1971. His IQ was reported as 72.
Q And who did that testing in 1972?
A That was a pediatrician named Dr. Dancel.
Q And what then caused Kevin to leave the Miners'

home? You testified that that occurred in 1977. What was the cause of that?
A The Social Services staff were understaffed at that time. They decided to drop supervision of the Miner children from their case load. After that case was dropped Kevin again had a disagreement with Mrs. Miner because she continued to come into the bathroom while he was taking a bath. And he left the home because of that argument, because of those sort of things happening.
Q Did he run away from home?
A He ran away from home.
Q Was he found or what -- where did he turn up next after running away from the Miner home?
A It was reported that he ran away. I can't recall who --

Q Would it refresh your recollection to look at the report?
A Yes.
Q Page 16.
A Okay. Family and Childrens Society found Kevin and reported that he was homeless and that the basis for running away was his confrontation between he and his foster mother. Also that Charlene had recently left the home and this upset him also. Again, complaints of privacy in the bathroom.
Q Okay.
A And also of physical discipline, of hitting them with things and their hands.
Q I see. Where did Kevin go next after he turned up at the Family and Childrens Society?
A He was placed in another foster placement with

17 Mrs. Ware.
18 Q What was the Ware home like?
19 A He stayed there for approximately seven, eight
20 months.
21 Kevin -- Mrs. Ware observed Kevin's behavior,
22 reporting his nervousness, reporting his inability to get
23 along with the other children in the foster home. Also
24 bizzare behaviors. He refused to sleep in the bed. He would
25 slept on the floor instead. Refused medical attention for a

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1 sore throat. Refused to eat.
2 And she requested -- at that time Kevin again was
3 examined and a lot of the prior sort of findings about his
4 hyper-activities, inability to concentrate, his memory and his
5 staring and bizzare behaviors again were confirmed.
6 Q Those findings -- are you saying that those same
7 findings were made by different people in 1977?
8 A Yes.
9 Q You testified that he spent seven, eight months
10 in that home with the Wares. Where did he go after the end of
11 that seven, eight month period?
12 A He was placed in another foster home with the
13 Huntersers. It was some older children in the foster home if
14 I'm not mistaken. Yes, that's correct.
15 The husband of the foster mother, Mrs. Hunter, was
16 an alcoholic and came in and had what was called "drinking
17 brawls," described as drinking brawls by the children or by
18 Kevin, rather, with Mrs. Hunter.
19 Q Okay. And how long did he remain at the Hunter
20 home?
21 A Only about three months.
22 Q Where did he go then?

23 A Then he returned to the Miner home, to Mrs.
24 Miner.
25 Q After the abuse that you described that he

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1 received at the Miner home why did he go back to the Miner
2 home?
3 A The records indicate that Kevin believed or just
4 felt that this was the most stability he had ever known in his
5 life and that returning to Mrs. Miner was his best option for
6 him at that time.
7 Q Okay. How long did he stay the second time with
8 the Miners in 1978?
9 A Approximately seven months.
10 Q And what was that seven month stay like?
11 A Kevin had a difficult time with his behavior.
12 It was reported that he smacked or hit one of the younger
13 Foster children in the home. During that time there are
14 repots from school system of erratic behavior in school. The
15 principal had taken -- had seen Kevin many times and reported
16 Kevin's difficulty with his behavior. The principal did note
17 in the records that he felt that Kevin was not a delinquent
18 child but just a confused child. The principal from the
19 record states that he saw that Kevin was troubled and because
20 of the aggressive behavior towards the younger children in the
21 foster home he was removed and placed in a home with older
22 children.
23 Q What was that home?
24 A That home was the home of Mrs. Martha Blackwell.
25 Q How old is Kevin at this time?

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A At this point Kevin is approximately sixteen, seventeen years old.
Q When was -- how long did he stay with the Blackwells?
A Approximately nine months.
Q From when to when?
A From November '78 to July of '79.
Q Okay. Were there other children in the Blackwell home?
A Yes, there were some other foster children around his age. There were also sons of Mrs. Blackwell's that stayed there.
Q Who were the sons that remained?
A The sons Kevin recalled was Rocky and Herbert. Kevin states that he was sexually molested by Kevin and that Marvin, one of the other foster children, was sexually molested by these older children of the foster mother and that this also occurred to one of the foster girls in the house also. And this molestation occurred by getting Kevin to come down into the basement to smoke some pot and then they jumped Kevin and raped him.
Q How did Kevin react to this?
A Again, very confused, very hurt. Again, it was reported around that time from the social service records that Kevin again exhibited the dazed, wide eyed expression, this

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blankness and erratic behaviors.
Q Was Kevin still in school during this period?
A Kevin --
Q Would it refresh your recollection to look at

the report?
A Yes.
Q Page 21 or 22.
A I can't recall if he was in school at that time.
Q Let me ask you a different question. When did Kevin leave school?
A During the 11th grade, which is when he was approximately eighteen years old.
Q And was Kevin evaluated at that time by a person named Lawrence Hines?
A Yes, he was.
Q What did that evaluation reveal? First of all, who is Lawrence Hines?
A He was a staff member, a MSN -- I guess that is a nurse, Master's Degree nurse -- with a constant care community health center here in Baltimore.
Q What did Lawrence Hines conclude from that evaluation?
A Well, he referred to the strange and bizzare behavior of Kevin, being infantile at times, hostile at others. His inability to remain oriented to time, place and

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person. His history of forgetting things and causing problems in the foster home. His limited intellectual capacity. And his impression was that Kevin was suffered with mental retardation with cranial pathology and he suggested a physical exam and brain scan. He noted a question of head trauma in Kevin's record.
Q Okay. Where did Kevin go after the Blackwell home?
A He was arrested at that point and as a way of resolving his arrest he joined the Job Corp. So he went into

11 the Job Corp at that time.
12 Q When did he first sign up with the Job Corp?
13 A 1979.
14 Q Okay. How long did Kevin remain in the Job
15 Corp?
16 A Approximately two years. Maybe less than two
17 years.
18 Q Okay. Is that based on his recollection of it?
19 A Based on his recollection and the slim records
20 that we had about the Job Corp.
21 Q What happened to Kevin Wiggins in the Job Corp?
22 A Kevin reported that he was befriended by a Mr.
23 York, who was an administrator at that time who Kevin was
24 often left with during holidays and weekends. He was often
25 the only boy or one of the few boys remaining at the facility,

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1 at the Woodlawn facility. Mr. York befriended him and
2 eventually was able to take Kevin out for visits out in the
3 community. During that time he got Kevin drunk and sexually
4 molested him and became -- tried routinely to become sexually
5 involved with him.
6 Mr. York was fired and then he made continual
7 contacts with Kevin trying to get him to live with him so that
8 he could maintain this sexual relationship with Kevin.
9 Q Okay. I want to get sort of a sense of summary
10 of your testimony. Could you summarize in this case Kevin's
11 first five years with his natural mother?
12 A That he was abandoned, neglected, went without
13 food, went without proper guidance. He was physically abused
14 by both his mother and his siblings and suffered significant
15 trauma related to those events.
16 Q Okay. And then you have described, your

17 testimony is that you have described a series of placements in
18 foster care. What is the common thread that runs through his
19 foster care after being removed from his mother's custody?
20 A One of the threads is the existence of Kevin
21 being sexually molested by caregivers. Also his symptoms of
22 staring into space noted at school and in the foster care
23 placements themselves. Also the symptoms of what people
24 described as his disorientation to reality. All those are
25 consistent throughout his foster care placements.

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1 Q Okay. And in your experience, Mr. Selvog, with
2 victims of sexual abuse, your clinical experience in that
3 regard and also your experience in gathering social histories
4 and investigating the backgrounds of capital petitioners and
5 other individuals, what effects does this sort of childhood
6 history have later in life?
7 A Well, the effects of that sort of abuse and
8 experiences of neglect cause these sort of behavior problems
9 and emotional problems that Kevin exhibited throughout his
10 life.
11 Q Have you witnessed those behavior problems in
12 other people that you have counseled?
13 A Yes, I have.
14 Q What are those behavior problems as you have
15 witnessed them?
16 A Inability to form attachments. Emotionally shut
17 down and numb, depersonalized, disassociated in terms of not
18 being able to integrate memory, memory identity, consciousness
19 from time to time, which goes to the observation of Kevin as
20 being disoriented to reality.
21 Q Okay. And is that experience that you had with
22 other victims of abuse consistent with the effects you

23 witnessed in your contacts with Kevin Wiggins?
24 A Yes, it is.
25 Q And describe, if you would, those effects that

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1 you witnessed in talking to, interviewing Kevin Wiggins?
2 A Kevin exhibits extreme signs of depression. He
3 exhibits suicide ideation.
4 Q What does that mean? What is suicide ideation?
5 A A sense of hopelessness and considering the
6 option of suicide as a way of ending the hopelessness and the
7 depressing feelings that he has. That he exhibits
8 depersonalization regarding the accounts or relating the
9 accounts in a very disturbed, very difficult -- very difficult
10 for him to relate these accounts and when doing so he refers
11 to the person to himself as if he was watching what was
12 happening rather than actually saying what was happening to
13 him, which is depersonalization, which is a symptom of someone
14 who suffers these sexual and physical abuses.
15 Also his erratic behaviors from being completely
16 dependent and infantile at times to being hostile and
17 aggressive. Aggressiveness is a frequent symptom of someone
18 who experiences physical and sexual abuse. And his inability
19 to concentrate, being hyperactive throughout his academic
20 career. I think that sums it up.
21 Q Okay. And this depression you mentioned and
22 these suicidal feelings, are they consistent with what the
23 records say about Kevin Wiggins growing up, the records that
24 you examined?
25 A Yes.

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1 Q Okay. So you don't believe in your opinion in
2 covering these cases and in working with Kevin Wiggins, you
3 don't believe that these feelings that Kevin Wiggins
4 transmitted to you were a recent phenomenon?
5 A No, I do not.
6 Q Do you believe they are consistent with how he
7 has felt throughout his life as a result of the abuse that you
8 have uncovered?
9 A Yes, I do.

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19 BY MR. SIEGEL: [WITNESS: HANS SELVOG]
20 Q Mr. Selvog, I want to return to what we left off
21 with which was a little bit about your methodology and your
22 profession. Is it appropriate in your profession to gather
23 the information that you have gathered and to use the methods
24 you have used and to draw conclusions from them?
25 A Yes, it is.

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1 Q And can you explain the basis for this opinion
2 that both your method and your conclusions are generally
3 accepted in your profession?
4 A That just to say that psychiatrists and
5 psychologists also rely on this type of information to make
6 proper evaluation and appropriate diagnoses in these cases.
7 Q Okay. Is there something about your education
8 that leads you to think that it is generally accepted to draw
9 conclusions based on information gathered through
10 investigation based on a petitioner?

A Yes. One's history and the symptoms present in that history are one of the primary and predominant means of arriving at conclusions of disorders in emotional problems.
Q And are there other aspects of continuing education that you engage in as a social worker that lead you to think that your methods and your conclusions are generally accepted in the field?
A The requirement for continuing education credits in our field approved by the state, and others such as seminars and training programs, and the periodicals that social workers read about his profession that also support this.
Q These sources that you mentioned lead you to conclude that it is generally accepted then to draw conclusions from an individual's history that you gather

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through whatever means you gathered that history?
A Yes.
Q Okay. Could you, Mr. Selvog -- let me ask you again how many cases, how many social histories you have worked on in your experience?
A In capital cases in particular?
Q In general.
A Hundreds and hundreds of social histories throughout my career. I have been a social worker twenty years.
Q So is it your testimony that you have examined the social histories of hundreds and hundreds of different individuals?
A That's correct.
Q And what have you looked for in each of these histories?

A Patterns of function and dysfunction within the family, within the individual and the family and within the individual in other institutions and society.
Q Could you compare this case, this incident of abuse that you have uncovered with Kevin Wiggins, to the other cases in which you have participated?
MS. BROBST: Objection.
THE COURT: Sustained.
MR. SIEGEL: May I be heard?

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THE COURT: I don't think so. He certainly doesn't have any background that you have given so far to do that. Then what you are doing is you are imposing upon the prerogative of the jury. They are the ones that determine that. He doesn't. All he does is serve it up.
MR. SIEGEL: Thank you, Your Honor. No further questions of this witness at this time.
CROSS EXAMINATION
MS. BROBST:
Q Thank you. You testified that it is common practice and an accepted principle to gather a history and to draw conclusions therefrom, is that correct?
A Yes.
Q Isn't it true that is very important that you have an accurate history, in order to form accurate conclusions?
A Yes.
Q Let me talk to you about a little bit of the specifics --

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[BY MS. BROBST:]
Q Now, relating to certain specifics about which you have testified regarding specifically instances of sexual abuse, when did this sexual abuse begin; at what age?
A For Kevin Wiggins?
Q Yes.
A I'd say approximately -- he went into foster care around age six or seven. So around age seven.
Q And at how many hands; at the hands of how many individuals was the defendant sexually abused?
A I'd say three.
Q And those were until he was the age of what?
A Twenty, twenty-one.
Q He left foster care well before that, is that correct?
A That's correct.
Q He was in the Job Corp for awhile?
A That's correct.
Q Okay. So many of them or some of them -- strike that. One particular instance you said he was abused on a daily basis. That was in the Miner home, is that correct?
A Yes. May I clarify? Sometimes it happened for days at a time. Sometimes it happened periodically, maybe a month at a time. But it went on for a period of years, that sort of pattern.

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Q Now, you are a licensed clinical social worker but you also have a specialty, is that correct?
A Yes, it is.
Q Lately, at least, your career has been more or less dedicated to this area of sexual child abuse, is that correct?

A Yes.
Q And you are, or are you not, satisfied that these reports are accurate in the case of Mr. Wiggins?
A Yes.
Q So naturally you then reported these instances to the proper authorities, isn't that correct?
A I don't understand the question.
Q You are aware, are you not, that when a health professional receives a report of child abuse, that professional is required to report that abuse both to the law enforcement authorities and the State's Attorneys Office?
A Yes.
Q And you have done that in this case?
A No, I haven't done that. That has already been reported many, many years ago when this case first came into the court here.
Q Reports of this abuse, sexual abuse of this child, it is your testimony, were made many years ago?
A I haven't seen it in the reports but I know that

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Social Services were aware of these allegations.
Q Can you show me where in your report you indicate that?
A No, I did not include it in my report.
Q So you are saying that you have reports from the Department of Social Services that back up these allegations of sexual abuse but you didn't include them in your written report?
A No, I do not have that information.
Q Okay. Let me get this straight. You are not then aware that this sexual child abuse which you believe occurred was ever reported to the authorities, is that

13 correct?
14 A No, I believe it was reported.
15 Q Why do you believe that, sir, if you don't have
16 any of those repots?
17 A I didn't send in for any reports for that
18 information.
19 Q Mr. Selvog, you include in the written report
20 which has been introduced as a defense exhibit in this case
21 many instances of reports of DSS workers relating to his
22 inability to make eye contact, his staring into space, the
23 neglect and so forth. Can you show me one place in this
24 report where you show any health care professional ever having
25 stated that he was sexually abused or that they had a report

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1 of sexual abuse?
2 A No, I cannot.
3 Q But nevertheless you, yourself, did not report
4 this to the proper authorities, is that correct?
5 A No, I didn't feel it was appropriate to report
6 this.
7 Q Well, you are aware that it is required by law
8 to report it upon receiving such a report, are you not?
9 A If that abuse occurs to a child.
10 Q It is your testimony that in your opinion you
11 certainly -- you don't even have to agree that it occurred.
12 You have to receive a report that it occurred, is that
13 correct?
14 A I don't understand the question.
15 Q If a health professional receives a report of
16 child sexual abuse, that person is required to report that,
17 isn't that correct?
18 A Yes, if that abuse occurs to a child.

19 Q And your testimony under oath was that you
20 received such a report?
21 A I received that report from Kevin Wiggins who
22 was an adult at the time.
23 Q But you are required to do it even if the
24 person, the victim is now an adult; if it occurred while he is
25 a child, that report is required by law, is that correct?

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1 A No, that is not correct.
2 Q Okay. Are you familiar with Family Law,
3 Maryland Annotated Code, Section 5-704, the reporting statute?
4 A No.
5 Q Okay. That would be Maryland Annotated Code.
6 You are not familiar with that?
7 A No.
8 Q And I take it you are not familiar with the
9 opinion of the Attorney General dated December 3rd, 1993
10 regarding the requirement of reporting when the victim is now
11 an adult?
12 A No.
13 Q Well, do you consider what you did in this case
14 -- I think you testified on direct that you did -- that you
15 were acting as a professional in the State of Maryland as a
16 professional licensed clinical social worker?
17 A Yes.
18 Q Don't you think you should then be familiar?
19 MR. VERRILLI: Obligations under Maryland law?
20 A Yes.
21 Q Now, you are being reimbursed for your services?
22 A Yes.
23 Q And may I ask how much you are receiving?
24 A Fifty dollars an hour.

25 Q And how many hours have you spent on the case

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1 thus far?
2 A I have spent one hundred hours on the case.
3 Q And have other members of your -- is it a
4 corporation for which you work?
5 A Yes, an agency.
6 Q Are other people also billing?
7 A Yes.
8 Q Do you know how many hours your agency has
9 billed?
10 A An additional one hundred hours.
11 Q So that is a total of two hundred hours at fifty
12 dollars an hour. Is it billed the same way?
13 A Not entirely. The other billing would be
14 anywhere from twenty-five to fifty.
15 Q You have testified in six death penalty cases in
16 Maryland. Have they all been on post conviction?
17 A Yes, they have -- I'm sorry. Not all of them
18 have been on post conviction. Some were at the trial level.
19 Q Have you ever testified in a post conviction
20 proceeding where you haven't found additional information than
21 what was provided at sentencing?
22 A No.
23 Q When you interviewed the defendant, Mr. Wiggins,
24 was he aware or did you tell him for whom you were working?
25 A Yes.

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1 Q And did you tell him what your purpose was?
2 A Yes.

3 Q Okay. You stated that your source of
4 information from which you based your conclusions were the
5 defendant himself, three sisters, an aunt, two cousins,
6 records of the Maryland social service record and medical
7 records, is that correct?
8 A Say that again, please.
9 Q Okay. My understanding of your testimony on
10 direct was you based your conclusion on interviews with the
11 defendant's mother, his three sisters, an aunt, two cousins,
12 Maryland social service records and medical records?
13 A That's correct.
14 Q Okay. Did you have an opportunity to review
15 police reports?
16 A Yes, I did.
17 Q Did you have an opportunity to review the
18 presentence investigation which was compiled for this case?
19 A Yes.
20 Q I had an opportunity while you were testifying
21 to review your report and while you mention he has a sister
22 Charlene, nothing that she relates is contained herein. Is
23 Charlene here today?
24 A No, she is not.
25 Q Okay. So you liberally quote from India, the

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1 other sister, but you don't mention anything Charlene told
2 you, although you do state that you interviewed her, is that
3 correct?
4 A Right.
5 Q Were you aware of Charlene's comments in the
6 presentence investigation?
7 A I don't remember at the moment.
8 Q If I showed you the presentence investigation do

you think that would refresh your recollection?
A It might.
MS. BROBST: Would you mark this, please.
(WHEREUPON, the above referred to document was marked for Identification as State's Exhibit Number 1.)
Q Mr. Selvog, I'm showing you that which has been marked as State's Number 1 for Identification only at this time. I refer you to page 5 of that report under personal history, the second paragraph. I'd like you to review that paragraph and tell me whether or not that refreshes your recollection as to what is contained therein regarding Charlene's statements to the presentence investigator.
A Yes.
Q That does refresh your recollection?
A Um-hum.
Q What does it say that Charlene said regarding

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the family situation during the defendant's early years?
A That they were raised together in foster care. That they lived in three homes. The longest was ten years. Although the foster mother was strict, she provided a nice home with a roof over their heads. Is that what you are referring to?
Q Yes. In fact, the defendant himself related to you that he has fond recollection of Mrs. Miner; that while she was strict, she was a caring person, is that correct?
A Yes.
Q Now, take your time and review the presentence investigation if you need to. But are any of these allegations of gross physical abuse or sexual abuse contained in the presentence investigation?

A No, they are not, to my recollection.
Q Did you make an effort to interview any of those people whom you alleged were the sexual abusers of the defendant, Mr. Miner, Mr. York or Mr. whoever was in the middle?
A Yes, we tried to find these people but were unable to locate them.
Q What efforts did you make to locate them?
A Phone book. Social Service -- I called Social Services to see if these people might be available still.
Q In terms of if they were still foster parents?

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A That's correct.
Q Mr. York, I believe his name was, worked at the Job Corp center with young men?
A Yes.
Q Wouldn't that be great concern to you that if these people are sexual abusers, that they still might be working in the foster parent program in Baltimore City or Baltimore County?
A Yes.
Q But nonetheless you didn't report it?
A He wasn't working there.
Q You are unaware of whether he is working somewhere else?
A That's correct.
Q Needless to say, the police aren't looking into it as a result of your investigation, is that correct?
A Not to my knowledge.
Q You testified, and your report is rather lengthy, regarding the years until he leaves foster care and then you briefly relay his employment history on page 24 of

your report?
A Yes.
Q Don't you think important information for one of these social histories is also somebody's criminal history?
A Yes.

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Q But you don't include any of that in your report, do you, other than the fact that he entered the Job Corp?
A No, my specific task was to chronicle his early years, his social history years.
Q Well, isn't your criminal record part of your social history?
A Well, I knew it was in the pretrial report and so I just chose not to put it in there not to be repetitive.
Q How about his driving history? Even the fact that he had a driver's license, don't you consider that significant?
A Perhaps.
Q How about his institutional history, don't you consider that significant?
A Not when my specific request from the defense team was to do a social history on his early childhood.
Q That would -- on his early childhood?
A Yes, adolescent years.
Q You were restricted to that area?
A Primarily.
Q Well, did you receive a written request from them what they wanted you to go into or was that an oral request?
A That was just orally requested. That is the

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normal course of what I do is chronicle the early years.
Q Isn't it important information to know how somebody matures, what they do in later years; isn't that significant if one renders an opinion?
A Yeah, if that wasn't the focus of this particular report.
Q You are comfortable making a conclusion, a kind of broad conclusion at the end of your report, is that correct?
A Yes, I am, based on the facts in the report and the facts of my investigation.
Q So do you find it significant that he entered a relationship with an adult woman by whom he had a child in his later years or that they lived together or any of that; that doesn't seem significant to you?
A What are you referring to specifically?
Q Geraldene Armstrong, a woman several years older than him, with whom he had a relationship, sort of like what we might call a common law marriage, if that existed in Maryland. Were you aware of those facts?
A Yes.
Q And that he had fathered a child?
A At the moment I can't remember if he had fathered a child.
Q If you had included it in your report, it would

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probably be easier for you to remember that, isn't that right?
A Yes.
Q Did you interview Charlene?
A Yes, I did.

Q Now, with respect to the burning that you described in some detail on direct examination, did you find hospital records verifying the defendant's statement that he was hospitalized for approximately two weeks?
A No, I did not.
Q He even gave you the name of the hospital that he went to, is that correct?
A Yeah, he gave me the name of the hospital he thought he might have gone to. He wasn't sure.
Q Okay. And were the Tinklers interviewed?
A No.
Q Did you attempt to locate them?
A Yes, we attempted to locate all of the foster parents. I don't think we located any of them.
Q You did say you found certain records regarding the Tinklers, is that correct?
A Yes, it is.
Q Do you have the report of the medical doctor who you say removed him from the home after the examination by the medical doctor? Did you find that report?
A If it was in the social service records I don't

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recall seeing that examination by the medical doctor.
Q Do you recall testifying on direct that he was removed from the home after a medical doctor examined him and saw the twisting pinches?
A No. I recall testifying that -- removed from the Tinkler home?
Q Correct.
A Right. That was testimony from the two sisters.
Q But you didn't find a doctor's report verifying that?

A No, we did not.
Q Even though it would have been a doctor employed by DSS?
A Or else a doctor employed in private practice that the DSS used.
Q But no records to verify that?
A No.
Q Before -- how about the report of the hospitalization for being underweight; do you remember testifying that he was hospitalized for being underweight because he couldn't eat anymore because of the abuse he was undergoing?
A Yes, I remember testifying to that fact.
Q Did you find a hospital record to verify that?
A There is a hospital record in '72 about him

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having stomach problems and they couldn't find any basis to it other than the doctor just said rule out psychological problems.
Q Did it say anything about him being underweight?
A I don't recall at the moment.
Q Until you were told by the defendant about this sexual abuse, is there a single report to any other health care professional prior to yourself that you could find?
A No, there is not.
Q So from available records the first person who he told about the sexual abuse was you, the first professional person?
A Yes, it is.
Q And I believe you said, although I'm not sure, that you do not believe the sexual abuse is newly remembered, only that he never told any health professional before, is

17 that correct?
18 A Yes, as far as I can tell that is correct. That
19 is what I believe.
20 Q Now, you testified that he ran away from Mrs.
21 Miner's foster care because she would come into the bathroom
22 and violate his privacy and because she physically abused him
23 in terms of corporal punishment, is that correct?
24 A That's correct.
25 Q And you have reports corroborating that, is that

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1 correct? There are DSS reports that say that that is what the
2 defendant said at the time, that his privacy was invaded?
3 A That's correct.
4 Q But he never told anybody that he was being
5 simultaneously sexually abused by Mr. Miner, is that correct?
6 A That's correct, other than his attempt to tell
7 Mrs. Miner.
8 Q Unverified by her because you have been unable
9 to interview her?
10 A That's correct.
11 Q You have, as I understand it, interviewed his
12 mother Jean?
13 A Yes.
14 Q And she is still alive?
15 A Yes.
16 Q How old is she now?
17 A I can't say precisely. I would say fifty-four
18 or fifty-five.
19 Q And reports to you are that she has for thirty
20 years been a chronic alcoholic who drank daily to excess and
21 abused alcohol and drugs, is that correct?
22 A Yes, primarily.

23 Q You have interviewed hundreds of child victims
24 of sexual abuse?
25 A Yes.

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1 Q Have you ever --
2 A I'm sorry. Child victims of sexual abuse?
3 Q Victims of child sexual abuse?
4 A Yes.
5 Q Have you ever concluded that a claim was false
6 or unsubstantiated?
7 A Have I ever concluded?
8 Q In one of the people who you have interviewed or
9 done an investigation on?
10 A No, I have not.
11 Q Would a motive to fabricate abuse be considered
12 by you to be an important consideration in determining whether
13 a claim of sexual child abuse were true?
14 A Yes, it would.
15 Q Have you ever interviewed a defendant in a
16 capital murder case and not found a history of child sexual
17 abuse?
18 A It is hard to say for sure. I think I have,
19 yes.
20 Q Well, you list on the back of your resumé the
21 capital defendants whom you have done these cheeks on. I'm
22 familiar with some of them and unaware of any report. Perhaps
23 if you can tell us which of those individuals you failed to
24 find --
25 A I just can't remember on some at all without

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going back to my records.
Q Is it possible that has never occurred, that you have never interviewed a capital defendant --
A I don't think it is possible, that it never has occurred. I think it is possible that it has occurred that there hasn't been any sexual abuse in the background of some capital defendants.
Q Okay.
A I can say that with confidence, that there are some that don't have sexual abuse history.
Q Can you point for the Court to any documentation of the physical or sexual child abuse in any official report of the DSS or any health care professional prior to yourself at all?
A Sexual abuse did you say?
Q Yes.
A No.
Q Okay. How about physical abuse?
A Yes.
Q And that would be the reports contained in your written report?
A Yes, you mean the DSS records?
Q Yes.
A Yes.
Q Okay. You opined at the end of your report that

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those things you have testified about significantly contributed to the defendant's involvement in the present offense, is that correct?
A That's correct.

Q And you testified also that it was your opinion and the opinion -- my question is would you have offered it at trial, that you recalled that he is very disturbed and has difficulty distinguishing reality from fantasy?
A You are asking me if I would have said that?
Q If there hadn't been an objection which had been sustained?
A At the trial at the time?
Q Yes.
A You are asking me if I would have said he has a problem distinguishing fantasy from reality?
Q Did you say that on direct here?
A I said that in the record. It contained those observations. I probably would have said that from the record I had obtained those observations at the trial level.
Q Okay. And that he could be hostile and aggressive at times?
A Yes.
Q You also, I think, but correct me if I'm wrong, included in this report that he hates his biological mother?
A Yes, that he told someone that he hates his

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biological mother. I think that is in the record.
Q And none of those things would have been different in 1989, is that correct? Because you didn't do anything regarding his background except as regards his childhood background, is that correct?
A None of those things would have been different meaning?
Q Your report would not have been different had you written in 1989 recording those things, the hostility, the aggressiveness, that he is disturbed and has difficulty

distinguishing reality from fantasy and that his background contributed significantly to his involvement in this sense?
A No, put that way it wouldn't. It would have been along those lines.
MS. BROBST: Court's indulgence: That is all I have. Thank you, very much.
THE COURT: Redirect?
MR. SIEGEL: Yes, Your honor.
REDIRECT EXAMINATION
MR. SIEGEL:
Q Mr. Selvog, in your experience, your clinical experience with victims of sexual abuse, is it typical that those victims do not mention the sexual abuse at the time that it happens?
A Yes, it is.

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Q Can you explain why that is?
A Generally it is because the shame of being abused sexually. The claim of sexual abuse is not often believed by caregivers and usually because the people, most people are sexually abused by someone they know, someone in the family.
Q And how often in fact in your experience have these victims of childhood sexual abuse reported it at the time?
A Majority of the time they do not. 80, 90 percent of the time they do not report it at the time.
Q That is for the reasons you stated, shame, et cetera, is that right?
A Yes.
Q Is it also typical, Mr. Selvog, that childhood victims of abuse lack social service documentation of it?

MS. BROBST: Objection.
A Yes.
THE COURT: Sustained.
Q Let me phrase it this way, Mr. Selvog. Is it typical that childhood victims of physical abuse do not tell people at the time of the physical abuse at the hands of parents, let's say?
MS. BROBST: Objection.
THE COURT: Sustained.

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[BY MR. SIEGEL:]
Q Mr. Selvog, let me ask you this then. What I'm trying to get at is in your experience with the cases that you have examined, frequently are there no contemporaneous references to the physical abuse that these victims have suffered that you have worked with?
A Can you say that again, please?
Q In the victims that you have worked with of physical abuse, is it frequent that there are no mention at the time the physical abuse was suffered of the abuse, that they later recall as adults?
A That's correct.
Q Why is that the case?
A Of the physical abuse?
Q Yes.
A I guess there is a lot of reasons. I think one of the primaily reasons is that because, again, the abuse comes from a family member. The child receives physical abuse may believe that it is deserved and within the culture of that family believes that that is an accepted form of punishment.
Q Okay. Along those lines how is it possible, given the abuse you have described on direct examination that

24 Kevin suffered by Mrs. Miner, that Kevin would have fond
25 memories of Mrs. Miner?

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1 A Because she took care of them, fed them, clothed
2 them, gave them a roof over their heads and gave them some
3 structure that they had never had in their lives.
4 Q Is it possible in your experience in the cases
5 you have examined of these victims of childhood physical abuse
6 that the victims have simultaneously some good memories of the
7 persons who abused them and also some bad memories in the
8 particular cases you have looked at?
9 A Yes.
10 Q Why is that the case, that they would have
11 conflicting memories like that?
12 A Because the abuse occurs from caregivers and
13 there are other times when the abuse is not occurring that
14 they form affection for the particular care giver.
15 Q Okay. Now, Ms. Brobst mentioned in
16 cross-examination that Kevin might have a motive to tell you
17 about his past and to say some of the things you have said.
18 Did you consider the possibility that he would have a motive
19 to make these things up?
20 A Yes.
21 Q What effect did that possibility have on your
22 conclusions?
23 A That I stayed aware of the manner in which he
24 divulged this information and all the other things consistent
25 with someone who was sexually abused as he reported in terms

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1 of how they remember it and any other symptoms present in his

2 history.
3 Q Okay. Is it your testimony that having
4 considered that despite Kevin's possible motive to make these
5 things up, that he is telling the truth about his past?
6 A Yes.
7 MS. BROBST: Objection.
8 THE COURT: Sustained.
9 Q Is it your conclusion --
10 THE COURT: He is not getting paid to make that
11 decision. I am.
12 MR. SIEGEL: Thank you, Your Honor.
13 THE COURT: My understanding of Maryland law is
14 that that is not admissible.
15 MR. SIEGEL: Thank you, Your Honor.
16 THE COURT: You can ask him this question. Did
17 you have any reason to believe he was not telling you the
18 truth?
19 THE WITNESS: No, I did not.
20 THE COURT: That is permissible. The other one
21 isn't. Any other questions, Ms. Brobst?
22 MS. BROBST: One area, Your Honor.
23 RECROSS EXAMINATION
24 MS. BROBST:
25 Q In your discussions for reasons why sexual abuse

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1 isn't reported is fear a very important consideration?
2 A Yes.
3 Q Aren't many of these children still in the home
4 where they are being sexually abused?
5 A I'm sorry. Which children?
6 Q Aren't many of the children still in the home
7 where they are being sexually abused?

8 A Which children are you referring to?
9 THE COURT: In the cases that you described.
10 Some of the cases where children do not report, when the sex
11 abuse occurs they are still in that home, right?
12 THE WITNESS: Yes.
13 Q They have been threatened on many occasions by
14 the people in that home, in that abusive environment, is that
15 correct?
16 A Yes.
17 Q They have been told if they tell something
18 horrible will happen to someone of them or someone they love,
19 is that correct?
20 A Yes, that occurs.
21 Q That particular aspect wouldn't exist if someone
22 was no longer in that home or abusive environment, that
23 particular impediment to reporting, is that correct?
24 A That's correct.
25 Q But you failed to mention that fear aspect when

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1 you were asked why people don't report sexual child abuse? It
2 is a recognized -- I mean everybody in your field knows that,
3 right?
4 A Yes.
5 MS. BROBST: Nothing further.
6 REDIRECT EXAMINATION continued.
7 MR. SIEGEL:
8 Q I'm sorry, Mr. Selvog. I forgot to ask you
9 this. Where are the Miners today?
10 A I think they are both deceased if I'm not
11 mistaken.

* * * *

In the Circuit Court for Baltimore County

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
(Post Conviction Hearing)
Volume 3
March 28, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

* * * *

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14 MR. VERRILLI: [WITNESS: CARL SCHLAICH]
15 Q Mr. Schlaich, could you give us your educational
16 background, please?
17 A I graduated from college at Randolph Macon. I
18 graduated from law school at the Univ. of Baltimore in
19 1981 and that is it.
20 Q Do you have any post graduate degrees other than
21 your legal degree?
22 A No.
23 Q What did you major in in college?
24 A Political science and computer science.
25 Q Did you take any courses in social work or

Page 5

1 sociology?

A No.
Q How about statistics?
A No.
Q Now, you are licensed and admitted to practice in this state as an attorney?
A Yes.
Q Can you give us your employment history since you were admitted?
A I was a law clerk at the Office of the Public Defender when I was admitted in 1981. Then I did some panel work for them as an attorney until I was hired full-time at the Patuxent Institution as an administrative assistant to the director.
Q When was that?
A In February of '82. And I worked there until I think October of '84 when I was hired by the Public Defender's Office full-time as an attorney here in Baltimore County. In 1988 I went to Harford County in the Public Defender's office and in 1990 I went into private practice with the law firm of Lester Jones.
In 1992 a friend and I opened up our own practice which is what we are doing now.
Q You said you left the public defender in 1990?
A Yes.

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Q Why did you leave?
A I was fired, basically.
Q Who fired you?
A Steve Harris, the Public Defender for the state.
Q What is the nature of your present practice?
A I do mostly criminal defense and our practice in total is criminal defense and personal injury basically.

Q How do you get your clients?
A Word of mouth, referrals from other attorneys in town, past clients coming back are a large percentage of them. We do a little bit of advertising in the newspaper, the yellow pages.
Q Is your reputation important to you?
A Yes.
Q Do you think it matters in terms of your ability to attract clients that you have a good reputation as a criminal lawyer?
A Yes.
Q You represented the petitioner Kevin Wiggins?
A Yes.
Q When was that?
A I think 1989, but I can't recall for sure. Probably a year or so before we actually went to trial. Something like that.
Q Prior to your representation of Mr. Wiggins how

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many death penalty case had you served as an attorney in?
A One that went to trial.
Q And who was that?
A That was Doering was his last name, D O E R I N K. That was before Judge Fader.
THE COURT: I remember. Al Wayne Doering. He was living in a trailer park. He had gone into a house that was visible from the trailer park that he was living in. He went in with a gun and during the course of a robbery he killed a man.
He had a horrible childhood. It stunk. He was really messed up in the mind. He was given the death penalty by the jury. When I fill out the report of the trial judge

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[THE COURT]
2 him life. That was the case you were involved in, right?
3 THE WITNESS: Yes, sir.
4 THE COURT: Were you involved in the trial level?
5 THE WITNESS: The first trial.
6 THE COURT: Were you involved in the resentencing
7 thing?
8 THE WITNESS: No.

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11 BY MR. VERRILLI: [WITNESS: CARL SCHLAICH]
12 Q So Mr. Schlaich, you were counsel on the initial
13 trial and sentencing in the Doering case?
14 A Right. This one came up during the retrial of
15 that one. So I was asked did I want to do the retrial or
16 start a new one.
17 Q Any other capital cases?
18 A At that point I think only Doering had gone to
19 trial. I had one other that was a potential death qualified
20 case in Baltimore County. I can't remember the man's name.
21 It is two co-defendant's accused of murdering and robbing a
22 cab driver and ultimately the death notice was filed on the
23 other co-defendant.
24 Q And not on your client?
25 A Not on my client.

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1 Q So there was Mr. Doering and Mr. Wiggins and
2 that was it in terms of capital cases?

3 A I had one pending in Harford County during Mr.
4 Wiggins's case.
5 Q Who was that?
6 A That was Shuck, S H U C K. I don't remember if
7 a notice had been placed against Mr. Shuck or not, but it was
8 a case that was being handled as that being imminent.
9 Q Okay. Now, in the Doering case were you first
10 chair or second chair?
11 A First.
12 Q Had you had any second chair responsibility in
13 capital cases before?
14 A No.
15 Q So Doering was what year?
16 THE COURT: I don't think it was '89 because '89
17 was Gilliam. I'm the one that sentenced Gilliam to death.
18 That is when Doering came back to me because I had both of
19 those within a couple of months of one another. Doering was
20 before that.
21 MS. BROBST: It was '85, Your Honor.
22 THE COURT: I knew it was a long time. But that
23 came back just about the same time that I had tried Gilliam.
24 I sentenced Doering to life, which I always thought was one of
25 the reasons Gilliam took me, but I don't know. Then I had

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1 that.
2 A That sounds about right to me too.
3 Q Okay. You left the Baltimore County Public
4 Defender's office in 1989, is the right?
5 A I think I actually left in '88 and I still had
6 some cases here that I kept and traveled back and forth to
7 finish.
8 Q Was Kevin Wiggins case one of those cases?

9 A Yes.
10 Q How long in advance of the trial and Kevin's
11 case did you leave Baltimore County?
12 A I can't recall.
13 Q Was it a few days, a few weeks, a few months?
14 A I think it was a few months.
15 Q And during that span you spent the majority of
16 your time where, in Harford County or in Baltimore County?
17 A My full-time job was in Harford County and I
18 would say that I probably was down here a day a week or so.
19 Maybe more sometimes. I had two major cases pending.
20 Q Okay. That was in addition to your full-time
21 job in Harford County?
22 A Right.
23 Q And did you have administrative responsibilities
24 in addition to trial responsibilities in Harford County during
25 that period?

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1 A A few.
2 Q Okay. About how much of your time did that
3 take?
4 A Maybe a morning a week.
5 Q Okay. During that time, that period of months
6 you just described when you were in Harford County and you
7 were preparing for trial in Mr. Wiggins case, what percentage
8 of your time did you spend preparing his defense, Mr. Wiggins
9 defense?
10 A I would have a hard time estimating that. I'm
11 pretty sure that Miss Nethercott and I talked almost every
12 day.
13 Q I'm sorry to interrupt you. Perhaps you should
14 identify who she is?

15 A Co-counsel for Mr. Wiggins. I think we talked
16 on the phone just about every day. Michelle Nethercott was
17 doing the local leg work and most of the visits to see Mr.
18 Wiggins at the jail at that point in time. And then we would
19 get together and do the things that we needed to do
20 face-to-face once a week I would think. So roughly
21 twenty-five, thirty percent let's say.
22 Q So that is a day and a half a week?
23 A Up until getting actually ready for the trial
24 and weeks before that.
25 Q When was that, Mr. Schlaich, when did you start

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1 actually getting ready for trial?
2 A I think that I was let out of my Harford County
3 cases, case responsibility about a week before Mr. Wiggins's
4 case was supposed to start so I could have solid time down
5 here.
6 Q So it was a quarter of your time until then and
7 then full-time I take it once you were released from your
8 Harford County responsibilities?
9 A Right.
10 Q Well, who did most of the work in preparing Mr.
11 Wiggins case, you or Miss Nethercott?
12 A Miss Nethercott did most of the writing and the
13 motions researching and at some point most of the
14 communicating with Mr. Wiggins.
15 Q At what point?
16 A Well, I can't put a time on it. We reached a
17 point where we felt that Mr. Wiggins communicated more easily,
18 more readily with Michelle than with me. So we only sent her.
19 Q When did you reach that point?
20 A I couldn't tell you. I don't know.

21 Q Was it a week before trial, eight months before
22 trial?
23 A It was at some point after I went to Harford
24 County.
25 Q So --

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1 A Not immediately before the trial. A period of
2 time passed.
3 Q A period of months?
4 A Um-hum. Yes.
5 Q And I'm not sure I got an answer to the question
6 I asked you previously, who did most of the work; was it you
7 or was it Miss Nethercott in preparing for trial?
8 A I think Miss Nethercott did most of the work.
9 Q You said she did the legal work and drafting of
10 motion and pleadings?
11 A For the most part, yes.
12 Q Did you edit them?
13 A Yes.
14 Q What about factual development, who did most of
15 the work in terms of factual development?
16 A Most of the factual development was done I think
17 before I actually went to Harford County. So we worked on
18 that, Michelle and I, side by side literally -- our offices
19 were side by side and we were working on this every day.
20 Q So who did most of the work, you or Michelle?
21 A At that point I would say it was pretty evenly
22 split.
23 Q But then you left for Harford County?
24 A Yes.
25 Q That was several months before trial?

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1 A Yes.
2 Q Who did most of the work on the factual side
3 after you left for Harford County?
4 A Miss Nethercott.
5 Q What percentage would you say after you said it
6 was about equal before you left for Harford County; after you
7 left for Harford County what was the ratio would you say
8 between the factual work she did and the factual work you did?
9 A It is hard to put an estimate on that. She did
10 the majority of the factual work.
11 Q Substantial majority?
12 A Yes.
13 Q More than three quarters?
14 A I couldn't say. But a substantial majority.
15 Q Okay. Now, prior to your representation of Mr.
16 Wiggins had you ever attended any seminars or conferences on
17 the proper way to conduct a defense in a capital punishment
18 case?
19 A Yes.
20 Q Can you detail those for us, please?
21 A I went to one sponsored by the Public Defender's
22 Office. It was a two day seminar. I don't remember the year,
23 but it was before this case.
24 Q Where was it?
25 A It was at Saint Mary's Seminary in Baltimore

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1 City.
2 Q Here in Maryland?
3 A Yes.
4 Q Was it in 1987? Does that sound right to you?

A That sounds right.
Q What subjects were covered at that seminar?
A What sticks in my mind were jury selection tactics and mitigation proposals. And there were, as I recall, some jurors that actually volunteered to come from other cases who talked about what impressed them and what did not impress them.
Q What do you remember about the presentations of those jurors at the seminar?
A I remembered leaving there with the feeling that there was no real answer as to what impressed them and what didn't because everyone had a different opinion. Even people on the same case didn't think that the same thing was important to them.
Q What did they talk about?
A I don't recall any specifics anymore.
Q How about in general?
A Uhm --
Q Let me ask you this. Were they talking about what kind of evidence and argument moved them to vote against the death penalty, is that what it was about?

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A As I recall, I think the cases that they came from were cases where the death penalty was imposed but I can't say that for sure. The idea was they were going to explain what was good and what was bad.
Q And what kind of things did they say were good?
A I can't specifically recall what the jurors said they thought was good. I remember some of the themes of the conference about what the lawyers were saying.
Q Mr. Schlaich, I'm sorry to cut you off but let's stay with the jurors for a minute and talk about the rest of

the conference in a minute.
MS. BROBST: Objection. He was answering the question.
THE COURT: Did you finish your answer, sir? I thought you had finished.
THE WITNESS: Yes, sir.
THE COURT: You said you could not remember what the jurors said but you could remember what some of the themes of the conference were, is that correct?
THE WITNESS: Yes.
THE COURT: Does that constitute the answer to the question or do you have anything else to add?
THE WITNESS: That is my answer.
Q So you said, if I remember, Mr. Schlaich, that you couldn't remember in specifics what the jurors said were

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good defense arguments and good defense evidence?
A Right.
Q Do you remember in general what the jurors said?
A No.
Q Were there any expert panelists who spoke about proper way to conduct a capital defense at this seminar?
A It seems to me that there was a forensic social worker there and who else -- there was a panel and I don't recall who was on it.
Q And there was one panel?
A No. It was a Friday night and there was a panel I think that was when the jurors were there and then all day Saturday.
Q How many panels were there?
A I couldn't recall. Three, four, something like that.

17 Q How many did you go to?
18 A All of there.
19 Q What were they about?
20 A There were little groups breaking out where you
21 could only pick one as I recall.
22 Q Okay. So how many panels did you attend?
23 A Friday night, Saturday -- probably three or
24 four.
25 Q And what were they about?

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1 A I don't recall.
2 Q You just don't recall?
3 A No.
4 Q So all you can recall about this conference then
5 is that there were some jurors in capital cases who talked
6 about what was good defense argument and evidence and what was
7 bad, but you can't remember what was good and what was bad?
8 A Right.
9 Q Then there were three or four panels at this
10 conference; you went to them but you can't remember what they
11 were about except you do remember there was a forensic social
12 worker on one of the panels?
13 A Right.
14 Q That is it?
15 A Right.
16 Q Have you attended any seminars or conferences or
17 panels subsequent to that?
18 A On death penalty?
19 Q On death penalty issues.
20 THE COURT: Mr. Schlaich, did you indicate to us
21 when that conference was, sir?
22 THE WITNESS: It was indicated to me that it was

23 1987. That sounds correct.
24 THE COURT: Sounds good to you?
25 THE WITNESS: Correct.

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1 Q It was before you undertook the representation
2 of Mr. Wiggins.
3 A Yes.
4 Q Have you attended any other conferences or
5 seminars on capital defense?
6 A Not specifically on capital defense. The
7 subject has been covered in other criminal defense seminars.
8 Q That you have attended?
9 A That I have been to, yes.
10 Q Did you attend the panels that were covering
11 those subjects?
12 A Yes.
13 Q Did you -- can you detail for us when those
14 seminars occurred?
15 A I have been to the fall seminar that is
16 sponsored by Public Defender's Office and the Maryland
17 Criminal Defense Attorneys Association every year since it
18 started, which probably the next year is 88. And from time
19 to time topics related to -- that would apply to death penalty
20 cases have come up, juror selection, forensic experts, DNA,
21 things like that, that I feel are things you most frequently
22 run into in a murder case basically.
23 Q When you talk about forensic experts, what do
24 you mean by that phrase?
25 A Well, a forensic expert is a person who is an

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expert in some field and applies that to court cases.
Q And would a forensic social worker be one such expert?
A Yes.
Q Mr. Schlaich, I'm going to hand you a document which has been admitted into evidence with one qualification in this proceeding. It is PC-Number 2, the report of Hans Selvog. I will ask that you take a few minutes and read this document.
Your Honor, that may take the witness five or ten minutes. I don't want to burden the Court. If a short recess might be appropriate, that would be fine.
THE COURT: We will take a recess.
MR. VERRILLI: Thank you.
(WHEREUPON, the court recessed and reconvened.)
THE COURT: What you showed him, has that been introduced in evidence?
MR. VERRILLI: Yes, Your Honor, its admission was moved.
THE COURT: Fine. You must remember that it has been a long time. I can't remember what the status of evidence is. What exhibit is it?
MR. VERRILLI: PC-2. There is a qualification on its admission. I want to make sure it is clear. Ms. Brobst objected to a number of the conclusions in the report. The

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objections were overruled except that one was sustained, and that went to the material on pages 26 and 27 where the report quotes from a Doctor Marie Fortune. The Court --
THE COURT: Page what?

MR. VERRILLI: 26 and 27.
THE COURT: All right.
MR. VERRILLI: This is all at pages 50 to 53 of the transcript of the January hearing. With that qualification it was offered, all the objections overruled except that one.
THE COURT: All right. Thank you.

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[BY MR. VERRILLI: WITNESS: CARL SCHLAICH]
Q Let's go back to the mitigation case now, Mr. Schlaich. After you left for Harford County, which I take it was some months before the trial, who had the primary responsibility for developing the case in mitigation and sentencing, you or Miss Nethercott?
A I think that the primary responsibility -- you said for mitigation. Is that specifically?
Q Yes.
A As I recall, we arranged it so that Michelle Nethercott did most of the mitigation preparation. That is my recollection.
Q And did you give her guidance about what to do?
A Yes.
Q What did you tell her to do?
A Well, basically what we did in mitigation was attempt to retry the factual case and try to convince a jury that the State's case on principal issue was just not there.
Q Right. When did you make that decision?
A I don't recall timewise, but I'm sure it was before the trial on the facts because it had to do with how we made the decision about what to recommend to Mr. Wiggins about

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1 jury or judge trial, et cetera.
2 Q So it was in advance of the guilt/innocence
3 trial, is that what you are saying?
4 A Yes.
5 Q How far in advance?
6 A I don't recall.
7 Q Days, weeks, months? How far?
8 A I'm sure it was weeks or months. We didn't rush
9 into this thing.
10 Q So months in advance you made a decision that
11 that was going to be your case at sentencing?
12 A A final decision, no, I don't think we made that
13 months in advance. But I think that was the plan that we
14 operated on at some point in advance of the trial on the
15 facts.
16 Q Months in advance of the trial you settle on a
17 plan that your strategy at sentencing would be to retry
18 guilt/innocence as you described it?
19 MS. BROBST: Objection.
20 THE COURT: Overruled. Can you answer that
21 question, sir?
22 THE WITNESS: I can't answer it with respect to
23 whether it was made months in advance. But that was the
24 decision that was made, yes.
25 Q And -- withdrawn. Now, did you engage --

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1 THE COURT: Let me ask a question to orient
2 myself. The guilt/innocence phase of this case was tried
3 before a jury?
4 THE WITNESS : No.

5 THE COURT: Before Judge Hinkel?
6 THE WITNESS: Yes.
7 THE COURT: The death penalty aspect, who was
8 that tried before?
9 THE WITNESS: A jury.
10 THE COURT: Okay. Go ahead.
11 Q And now, you testified previously about your
12 experience at this 1987 conference and that one of the
13 panelists was a forensic social worker?
14 A Yes.
15 Q Did you retain a forensic social worker to
16 assist in the preparation of the case on mitigation in this
17 case?
18 A My recollection is that we did not, but I can't
19 say that for sure without going through the materials which I
20 haven't seen since this case.
21 Q But your recollection is that you did not?
22 A Yes.
23 Q Now, were there funds available from the Public
24 Defender's office for such a purpose to retain such an expert?
25 A With a struggle, yes, there were funds

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1 available.
2 Q Was there any rule or policy of the Public
3 Defender's office that prohibited you from retaining a
4 forensic social worker?
5 MS. BROBST: Objection.
6 A No.
7 MS. BROBST: Relevance.
8 THE COURT: Overruled.
9 Q Your answer was?
10 A No, there was no policy prohibiting that.

11 Q Did any of your superiors at the Public
12 Defender's Office prohibit you from doing it?
13 MS. BROBST: Objection. Same grounds.
14 THE COURT: Overruled.
15 A No.
16 Q Well, weren't such social histories, work-ups by
17 forensic social workers, prepared in other capital cases
18 handled by the Maryland Public Defender?
19 A Yes.
20 Q You were aware of that?
21 A Yes.
22 Q During the time you prepared this trial?
23 A Sure.
24 Q Now, I have asked you to review the document
25 that has been admitted in evidence PC-2, the Selvog report.

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1 Have you had a chance to review that?
2 A Yes.
3 Q Do you know who Mr. Selvog is?
4 A No. I know the place that he is writing from.
5 Q By that do you mean NCIA?
6 A Yes, the National Center for Institutional
7 Alternatives.
8 Q What do you know about it?
9 A It is a place that I have used in the past in
10 some cases and what it does is attempt to establish mitigation
11 for you or attempt to find placement short of incarceration to
12 make recommendations for treatment centers.
13 I have used them in cases where they have put
14 packages together of here is what we do with this person, here
15 is what we would recommend doing with this person within the
16 ability of the system to fund it and to place the person and

17 then I have had them come to sentencing and testify.
18 Q At sentencing in capital proceedings?
19 A I don't think I used NCIA in a capital
20 proceeding. I used them in some juvenile waiver cases and one
21 that comes to mind was an attempted murder case, a juvenile
22 case in the waiver on that or the reverse waiver.
23 Q And this was during your time as an employee of
24 the public defender?
25 A Yes.

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1 Q And did you use their services at any time
2 before the trial of Mr. Wiggins?
3 A I don't believe so.
4 Q So it was after. Now --
5 A You mean --
6 Q Did you retain them for any case prior to your
7 representation of Mr. Wiggins?
8 A Yes.
9 Q So you knew about NCIA before you took on your
10 representation of Mr. Wiggins?
11 A Yes.
12 Q Does that include knowledge of the services they
13 could provide with respect to mitigation evidence in captial
14 cases?
15 A I don't believe I had seen them used in a
16 capital case. The only litigation type witness I had seen
17 used by the Public Defender's office in a capital case was a
18 social worker out of New Jersey whose name I don't recall.
19 Q Now, I'm sorry, I don't think I asked you that.
20 I asked you whether you were aware of the services that NCIA
21 could provide in a capital case at the time that you did Mr.
22 Wiggins's trial?

23 A Specifically in a capital case, no.
24 Q But you were aware that the public defender had
25 hired social workers to do work-ups on social histories?

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1 A Yes.
2 Q Like the one that is before you, PC-2?
3 A Yes.
4 Q And you did not do that as far as you can
5 remember in this case?
6 A That is my recollection.
7 Q But you knew that Mr. Wiggins, Kevin Wiggins,
8 had been removed from his natural mother as a result of a
9 finding of neglect and abuse when he was six years old, is
10 that correct?
11 A I believe that we tracked all of that down.
12 Q You got the Social Service records?
13 A That is what I recall.
14 Q That was in the Social Service records?
15 A Yes.
16 Q So you knew that?
17 A Yes.
18 Q You also knew that where were reports of sexual
19 abuse at one of his foster homes?
20 A Yes.
21 Q Okay. You also knew that he had had his hands
22 burned as a child as a result of his mother's abuse of him?
23 A Yes.
24 Q You also knew about homosexual overtures made
25 toward him by his Job Corp supervisor?

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1 A Yes.
2 Q And you also knew that he was borderline
3 mentally retarded?
4 A Yes.
5 Q You knew all --
6 A At least I knew that as it was reported in other
7 people's reports, yes.
8 Q But you knew it?
9 A Yes.
10 Q And you knew all of those things and you did not
11 retain a forensic social worker to do a social history?
12 A As I recall that is correct.
13 Q Okay. Now, Mr. Schlaich, is the case of Lockett
14 versus Ohio familiar to you?
15 A The name is.
16 Q Do you know anything about what the case holds?
17 A Not off the top of my head, no.
18 Q How about Ettings versus Oklahoma?
19 A Only the name.
20 Q Nothing about the case?
21 A Not at the moment.
22 Q How about Penry versus (Phonetic) Lynholm?
23 A No.
24 Q How about Hitchcock versus Douglas?
25A No.

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1 Q Can you name a single case from the United
2 States Supreme Court that sets forth the mitigating standards
3 in a capital case?
4 A No.

Q Not one?
A No.
Q Well, do you know at least that low intelligence can be a mitigating factor in a capital case?
A Sure.
Q Do you know that abusive family background can be a mitigating factor?
A Yes.
Q Do you know that sex abuse can be a mitigating factor in a capital case?
A Yes.
Q Now, you had testified previously that your approach to sentencing was to retry the guilt and innocence phase of the trial. When you decided on this approach to sentencing did you realize that one of the first things that would happen at the sentencing phase is that the judge would instruct the jury that he, the judge, had found Mr. Wiggins guilty of first degree murder and that the jury was obligated to accept that finding; did you understand that was going to happen?
A Yes.

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Q I want to turn to a different subject now, Mr. Schlaich, and it is an issue that you talked a little bit about a few minutes ago. It is the question about the availability of an expert, medical expert. Perhaps you could set the stage for us a little bit about explaining what your theory of the defense was at the guilt/innocence stage of this trial?
A Our theory was that Mr. Wiggins was in possession of property belonging to the victim, specifically her car and her credit cards, and was using them, and there

was a trial showing that he was using them before she was -- before she had died.
So the theory was that he could not have been personally responsible for her murder because he did not -- he did not come into possession of her property as a result of the murder of her basically.
Q So is it fair to characterize what you just said, to synopsize it by saying the time of death was a very important issue?
A Sure, that was key.
Q That was a key issue in your opinion?
A Yes.
Q Now, who was the State's expert at trial, the guilt/innocence trial with respect to the time of death?
A I don't recall. It was a female pathologist.

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Q If I told you it was Dr. Korell?
A Margerita Korrell.
Q Did you personally have any contact with Dr. Korrell prior to the guilt/innocence trial?
A I would have to check my notes. I don't recall.
Q You don't remember?
A No.
Q You don't remember talking with her?
A Not myself.
Q Did your co-counsel Michelle Nethercott?
A I know that Michelle talked with Dr. Korrell at some point. I don't remember when or for how long.
Q Do you remember what the substance of those conversations between Miss Nethercott and Dr. Korrell consisted of?
MS. BROBST: Objection.

17 THE COURT: Do you know, yes or no? Do you have
18 any recollection of knowing that information?
19 THE WITNESS: Yes.
20 Q Can you tell us what that was?
21 MS. BROBST: Objection.
22 THE COURT: Sustained.
23 MR. VERRILLI: Your Honor, might I --
24 THE COURT: One moment. Is it -- what you know,
25 is it something you read or something that Miss Nethercott

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1 told you?
2 THE WITNESS: I was told.
3 THE COURT: By who?
4 THE WITNESS: By Miss Nethercott.
5 THE COURT: So what you will relate to us now is
6 from what Miss Nethercott told you?
7 THE WITNESS: What I recall of what she told me.
8 THE COURT: Okay. That question he can answer.
9 A My recollection is that Miss Nethercott was told
10 that --
11 MS. BROBST: Objection.
12 THE COURT: What we need to know is what your
13 recollection is Miss Nethercott told you.
14 THE WITNESS: Okay. My recollection is that the
15 State was going to have some difficulty pinning down a time of
16 death.
17 Q Can you be more specific about what Miss
18 Nethercott told you? Can you remember anything more specific
19 than that?
20 A Not at this time, no.
21 Q Do you recall discussing with Miss Nethercott
22 whether that information that she received from Dr. Korrell

23 would necessitate her having to be a witness in this case?
24 A I remember that issue coming up. I think it was
25 after the guilt/innocence and before the sentencing when that

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1 occurred. I can't say for sure.
2 Q So you remember the issue coming up. When you
3 say coming up, do you remember discussing it with Miss
4 Nethercott?
5 A Yes.
6 Q Did you make a decision about whether she should
7 serve as a witness or not?
8 A Yes.
9 Q What was your decision?
10 A That we decided not to.
11 Q Why not?
12 A Because we -- I believed that Dr. Korrell was
13 not going to be so slippery, as to deny having had the
14 conversation with Miss Nethercott when Dr. Korrell testified.
15 Q So you thought that if -- that Miss Nethercott,
16 and please correct me if I'm mischaracterizing -- you thought
17 that if asked, Doctor Korell would agree that she had this
18 conversation with Miss Nethercott?
19 A Yes.
20 Q And that if asked she would agree with Miss
21 Nethercott's characterization of the conversation?
22 A Yes.
23 Q So it was on that basis that you decided Miss
24 Nethercott didn't need to be a witness?
25 A Yes.

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Q Was the possibility of Miss Nethercott having to recuse as a lawyer if she served as a witness a factor in that decision at all?
A Sure it was a factor, yes.
Q And can you explain the way in which it was a factor?
A Well, the person that has been preparing to handle the mitigation case suddenly would become unavailable and that would necessitate some rather grim changes.
Q That would be a particular hardship for you because you were in Harford County and had all of those other responsibilities?
A No.
Q No?
A No. Because I was freed of those responsibilities long enough to do Mr. Wiggins's case.
Q That week before trial?
A That was before the guilt/innocence and then we did the same thing before the sentencing.
Q So a week before guilt/innocence and the same thing before sentencing?
A I'm saying a week. I don't have a calendar.
Q But it was about a week?
A As I recall.
Q Now, did you do any research into the Maryland

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Rules of professional conduct before reaching this conclusion that Miss Nethercott would have to recuse herself if she served as a witness?
A I don't believe that I looked up the rules, no.

Q Do you know what rules of professional conduct are concerning this question of an attorney serving as a witness?
A No.
Q Do you know what the Maryland Rules generally say about this?
A I know there is a rule on it. I don't know what it says.
Q Do you know if it has any exceptions?
A I would imagine it does. I don't know.
Q You don't know?
A No.
Q So you don't know what they are?
A No.
Q You didn't look them up before you made this decision?
A Not that I recall.
Q Well, did you ask Miss Nethercott to look them up?
A Not that I recall.
Q Do you recall anybody looking them up?

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A Not that I recall.
Q So you don't know? You didn't know whether as a matter of Maryland Professional Rules of Conduct Miss Nethercott would have been required to recuse when you made this decision back in 1989?
A Right.
Q You didn't know and you didn't look into it?
A No.
Q I take it that you cross examined Dr. Korrell?
A I don't recall.

11 Q You don't recall who cross examined Dr. Korrell?
12 A No.
13 Q Do you recall anything about the substance of
14 the cross-examination?
15 A My recollection is that at the trial on
16 guilt/innocence Dr. Korrell's testimony was not particularly
17 strong for the State's case about pinning down a time. My
18 recollection is that at some point Judge Hinkel agreed that he
19 would not consider her opinion with respect to that.
20 Q Well, I guess I'm asking whether you remembered
21 -- withdrawn. Do you remember the substance of this
22 cross-examination?
23 MS. BROBST: Objection. Your Honor, the
24 transcript would reflect that.
25 THE COURT: Overruled.

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1 A No.
2 Q So I take it then that you do not remember
3 whether Dr. Korrell was even asked about this conversation
4 with Miss Nethercott?
5 A I don't remember.

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[WITNESS: CARL SCHLAICH]
9 CROSS-EXAMINATION
10 MS. BROBST:
11 Q In addition to availibility of witnesses, there
12 are a number of other valid reasons and things that go into a
13 decision of whether to go court or jury, is that correct?
14 A Yes.
15 Q And at the time you tried the Wiggins case can

16 you estimate for us approximately, if you can, the number of
17 felony cases that you had handled?
18 A I couldn't say for sure. I know that I was
19 handling two hundred a year, maybe more.
20 Q And you had been a member of the bar and
21 specifically employed by the Public Defender's office at that
22 point for approximately four or five years?
23 A Yes.
24 Q And in each felony case which goes to trial a
25 decision has to be made whether to proceed by court or jury,

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1 is that correct?
2 A Yes.
3 MR. VERRILLI: Objection. I did not -- I think
4 this goes beyond the scope of direct.
5 THE COURT: I don't think so. Overruled.
6 Q And you had made such a decision in consultation
7 with your client in each felony case you had handled that had
8 gone to trial, is that correct?
9 A Yes.
10 Q Can you explain for the Judge some of the things
11 you consider in deciding to go court as opposed to jury?
12 THE COURT: Sustained. As to this case he can
13 answer. As to generally, I don't want to listen to it.
14 Q Did you use your experience and training in
15 making the decision in this case?
16 A Yes.
17 Q And did you apply those factors to the decision
18 in this case, or at least the suggestion that you made to Mr.
19 Wiggins?
20 A Yes.
21 Q What was some of the factors that you considered

in this case on the issue of whether to go court or jury as to guilt and innocence?
A There were several. One would be my experience with juries in this county which I found to be that they are

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extremely conservative, that they are not for the most part filled up with highly educated people; that I found them to be very bent towards guilt; I found them in the cases before Mr. Wiggins to be very death oriented. I was concerned that a jury with that mindset would be overcome by the facts in this case which were that an elderly white woman was found drowned in a bathtub full of chemicals and we had a young, strong black man as the sole suspect brought forward and I thought that we had a good case on reasonable doubt and a jury might just look past that reasonable doubt under just those circumstances.
I thought that Judge Hinkel would be able to look past the race issue, past the issue that an elderly person had been killed and the circumstances under which she had been killed and look at the reasonable doubt question and make a decision, solid, intellectual decision.
Q So you felt this was a reasonable doubt case, is that a fair statement?
A Yes.
Q Additionally, you and co-counsel had filed a number of pretrial motions dealing with the issue of death qualified jury, is that correct?
A Yes.
Q You felt that a jury which became death - qualified, to wit had been Witherspooned, is more conviction

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prone, is that it?

* * * *

Q Did you consider and discuss with the defendant the apparent view of the Public Defender's office, since they filed this motion in every case, that a death qualified jury is more conviction prone?
A I believe that I discussed that with him, yes.
Q And didn't the defendant when waiving jury state that that was one of his reasons for electing court?

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A I don't know. I don't recall.
Q Okay. Now, the court/jury election with respect to guilt/innocence occurred at what time prior to trial?
A I just don't remember. I don't remember if it was just immediately before or whether it was a separate proceeding. I don't recall.
Q Do you recall those discussions occurring in the lock-up?
A The discussions with Mr. Wiggins?
Q Yes.
A I'm sure we talked about that in the lock-up here and at the jail previous to that.
Q And do you recall being present for those discussions?
A Yes.
Q You stated on direct examination that you had also been trial counsel in the case of Al Wayne Doering, is that correct?
A Yes.
Q And that case proceeded by jury with both

guilt/innocence and sentencing, is that correct?
A No, it was a judge facts and jury sentence.
Q Okay. And in the Doering case isn't it true
that you as counsel for the defendant introduced voluminous
mitigation evidence with respect to background?

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MR. VERRILLI: Objection as to the
characterization.
THE COURT: Overruled.
A Yes.
Q And did that include, as to background of Mr.
Doering, a psychiatrist?
A Yes.
Q And a psychologist?
A Yes.
Q And a social worker?
A I can't remember about the social worker. I
don't remember.
Q And Mr. Doering had also killed an elderly
person during a burglary, is that correct?
A Yes.
Q There was evidence that Mr. Doering had been
sexually abused as a child, is that correct?
A Yes.
Q And physically abused as a child, is that
correct?
A Yes.
Q He had been in foster care?
A Yes.
Q And all that information had been presented to
the jury in the Doering case, is that correct?

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A Yes.
Q And additionally, you had been able to
corroborate through records and the testimony of independent
witnesses that abuse in the Doering Case, is that correct?
A Yes.
Q And what sentence did the Doering jury return?
A Death.
Q You had tried that how long before you tried the
Wiggins case?
A I don't recall. I would guess two years or
maybe a little longer than that.
Q In your preparation for the trial of this case
did you have the -- did you ever consult with the Capital
Litigation Division of the Public Defender's office?
A I imagine I did because they control the purse
strings to some extent.
Q And do you recall filing their suggested
pretrial motion?
A Yes.
MS. BROBST: Your Honor, at this time I don't
intend to review with Mr. Schlaich the pretrial motion filed,
argued and litigated because I think they are part of the
record. I would ask the Court's permission to refer to them
in argument rather than go through the docket entries with
him.

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THE COURT: You don't need my permission to do
that.
Q So you felt that tactically the way to proceed
on this case would be to --

MR. VERRILLI: Objection.
THE COURT: Well, she can summarize. Go ahead.
Q Thank you. Get two shots at the principal issue, is that correct?
A Yes.
Q And you were aware or were you aware that the State had to completely retry the case before the jury on sentencing if you proceeded by a court at merits?
A Sure.
Q You would then -- wouldn't you then have available to you the transcripts of all of the witnesses who had testified at the Court trial?
THE COURT: I doubt that.
A I was going to say I don't recall whether we had all of the transcripts. We probably had the transcripts of Dr. Korrell for example who we knew would be coming back.
Q How about Edythe Vassar, didn't you feel she was an important witness for cross-examination; it would be nice to get two cracks at her?
A Yes. There was somebody that we deposed.
Q Right. And you had in fact deposed a witness

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pretrial in this case, is that correct?
A Yes.
Q Was that common practice for you as an assistant with the Public Defender's office?
A No. That was a first.
Q Okay. Did you bring with you to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury?
A It is not experience because I don't do that. I

try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to go after that point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish with it.
Q And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?
A Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.
Q And what did you think of that as a tactical

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position to take?
A It is a difficult position to take. There are things done to try to negate some of the bizzare appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like -- try to remove some of that taint of conflicting story there. But it seems to me if you can get away without doing it, it would be better.
Q Do you recall receiving from Judge Hinkel a big concession on the jury instructions --
MR. VERRILLI: Objection.

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[WITNESS: CARL SCHLAICH; BY MS. BROBST:]

20 Q Do you recall in camera discussions regarding
21 jury instructions at the death penalty stage?
22 A Yes.
23 Q Do you recall the issue regarding what a jury
24 must determine if aggravating circumstances were found to
25 outweigh mitigating circumstances?

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1 THE COURT: Remember anything about that?
2 THE WITNESS: Not specifically.
3 THE COURT: When she says in-camera, what do you
4 mean by that?
5 MS. BROBST: In the judge's chambers as opposed
6 to the courtroom.
7 THE COURT: Okay.
8 Q Prior to your trial of the Wiggins case had you
9 had experience with cross-examination of experts by the State
10 in the witnesses called by the defense on a defendant's
11 background?
12 A Yes.
13 Q And what was your experience in that regard with
14 respect to what could be elicited by the State?
15 A My experience was that once we started opening
16 the door, then the State would start asking about things that
17 could be construed as the person being a danger, as being
18 crazy, as being reasons why the jury shouldn't be particularly
19 merciful.
20 Q And do you recall whether a PSI was ordered in
21 this case?
22 A I'm sure it was.
23 Q Does a PSI include a background history of a
24 defendant?
25 A To some extent. I think that in this case we

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1 actually tracked down the PSI writer and supplied them with
2 things we had.
3 Q Okay. Prior to the hearing today had you been
4 provided by Petitioner's counsel a copy of what they are
5 referring to as PC-2?
6 A No.
7 Q So they never mailed that to you or gave you an
8 opportunity to view it before today's hearing?
9 A No.
10 Q Do you recall whether Dr. Korrell was able on
11 direct examination to give an opinion as to time of death in
12 this case?
13 A My recollection is that in guilt/innocence she
14 could not give an opinion. And at sentencing the Medical
15 Examiners Office produced her boss to testify that Dr. Korrell
16 was not so accurate.
17 Q Okay. If Dr. Korrell could not give an opinion
18 as to time of death on direct examination on guilt/innocence
19 what would have been the tactical advantage of cross examining
20 her on time of death?
21 A None that I could see because we had an expert
22 coming in who was going to address some of the same areas that
23 she addressed in terms of the things she used to reach or not
24 reach in this case a conclusion and say that you could and
25 here was the time of death.

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1 Q And were you aware of the possibility of opening
2 the door?
3 A Well, there is always a danger that she is going
4 to say if you look at something in a little bit different way

it could lead to this or that conclusion.
Q with respect to the challenge to the array, the panel as a whole, when you began your representation in the Wiggins case were you familiar with attempts to challenge the array in Baltimore County by other attorneys, whether in your office or private defense attorneys?
A I think that there was a death penalty case that had done it full scale prior to the Wiggins case but I don't recall what case that was.
Q And do you recall whether that was challenge?
A My recollection is that it was not.
MS. BROBST: Thank you, nothing further.
REDIRECT EXAMINATION
MR. VERRILLI:
Q Mr. Schlaich, let's talk about Dr. Korrell a little more. You testified as I heard you a couple minutes ago that there would be no tactical advantage to cross-examination of the medical examiner on time of death because she didn't give a time of death?
A My recollection is that she could not reach a

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conclusion.
Q Right. So there would be no tactical advantage because of that, is that correct?
A Right.
Q And, well, perhaps you could explain why you did cross examine her at guilt/innocence at time of death?
A I don't know if I did.
Q You know there would have been no tactical advantage to doing so but you don't know if you did it or not?
A I don't recall.

Q You remember there was no tactical advantage of doing it but you don't remember whether in fact you did it?
MS. BROBST: Objection.
THE COURT: Overruled.
A No.
Q Now let's go to sentencing. You testified a moment ago that there was expert medical testimony as to time of death at sentencing, correct?
A That is my recollection.
Q You testified about that a minute ago, correct?
A Um-hum.
Q Now, I take it that the tactical advantage that you described with respect to guilt and innocence wouldn't have any application at sentencing because there was expert testimony from the State about time of death at sentencing,

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right?
A Could you restate your question?
Q I take it that the tactical advantage that you agreed was present with respect to guilt/innocence because there hadn't been definitive testimony as to time of death at guilt/innocence wouldn't apply at sentencing because there was testimony from the State's expert as to time of death at sentencing, right?
A My recollection is that the time of death was not from Dr. Korrell at sentencing, it was from her boss.
Q There was expert testimony from a State pathologist at sentencing as to the time of death, correct?
A That is what I recall.
Q And the information that Michelle Nethercott had learned from her interview with Dr. Korrell which she had informed you about was inconsistent with that testimony at

17 sentencing, correct?
18 A That is not what I recall.
19 Q What do you recall?
20 A My recollection is that her information was from
21 a conversation with Dr. Korrell and not the other medical
22 examiner who testified.
23 Q That is what I asked you. The information that
24 Michelle Nethercott imparted to you about what court of law
25 informed her as to time of death was inconsistent with the

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1 testimony given by the State's other expert at sentencing,
2 correct?
3 A Yes.
4 Q And despite that you didn't call Michelle
5 Nethercott as a witness at that point after your tactical
6 reason evaporated, did you?
7 A I didn't call her as a witness at that point.
8 Q Despite the fact that your tactical reason
9 evaporated, you didn't call her, did you?
10 MS. BROBST: Objection. Asked and answered.
11 THE COURT: Overruled.
12 A I don't understand why I would want to call Miss
13 Nethercott. She is not an expert in that field. All she can
14 say is that Dr. Korrell told her she couldn't reach a
15 conclusion, whereas the doctor that had just been on the stand
16 said that she could.
17 Q Let's clarify a few things. The doctor on the
18 stand was an agent of the State, correct?
19 A Well, we hope not, but I consider them to be.
20 Q In the employ of the prosecution for purposes of
21 this case?
22 A Right.

23 Q So any admissions made by Dr. Korrel could be
24 attributed to the prosecution for purposes of this case?
25 A Yes.

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1 Q So not only did you fail to put Michelle
2 Nethercott on the stand after this transpired, you also failed
3 to cross examine Dr. Korrell who was on the stand at
4 sentencing about this conversation?
5 A I really don't recall whether I questioned Dr.
6 Korrell at sentencing.
7 Q You don't remember?
8 A I don't remember.
9 Q Okay.
10 A Now, in terms of the decision to go to the judge
11 rather than the jury at guilt and innocence, you testified, if
12 I remember correctly, that you thought Judge Hinkel would be
13 able to look past the race issue; that was one of your reasons
14 for opting for the judge?
15 A Not solely the race issue. I looked at it in
16 several factors offered together.
17 Q I'm asking if that was one of your factors?
18 A Yes.
19 Q I take it from that assertion that you were
20 concerned that the jury, had you chosen a jury at
21 guilt/innocence, might be influence by racial factor as one of
22 the reasons you opted for a judge?
23 A I think that I was concerned about them being
24 disturbed by the racial factor in conjunction with the fact
25 that the person was elderly and suffered some kind of bizzare

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death.
Q By the racial factor let's speak plainly here.
The fact is that it was a black man who killed an elderly white woman; that is what you were worried about?
A That is one of the things.
Q So that is one of the reasons you thought it would be better to go with the judge?
A Yes.
Q Despite that you never made an objection at the guilt/innocence phase of the proceedings to the jury composition on the ground that African Americans are systematically excluded, despite that concern you never made that objection?
A I don't recall making that objection, no.
Q In terms of the law that governs the sentencing phase, the capital sentencing phase, the law of the Supreme Court and this State, are you aware of the principle of 8th Amendment law?
MS. BROBST: Objection. Exceeding the scope of cross.
MR. VERRILLI: Not until you know my question.
THE COURT: We have a little thing going here. Let me hear the question.
Q Are you aware of the principle of 8th Amendment law that says legitimate mitigating evidence cannot

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permissibly be argued as aggravating evidence by the prosecution?
MS. BROBST: Objection.
THE COURT: Do you know anything about that?

THE WITNESS : No.
MR. VERRILLI : Thank you. Nothing further.
MS. BROBST: Nothing further.

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[WITNESS: MICHELLE NETHERCOTT]
BY MR. VERRILLI:
Q Miss Nethercott, are you an attorney licensed to practice law in the State of Maryland?
A Yes, I am.

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Q Can you give us your employment history since you became a member of the bar?
A Graduated from law school in 1984. I should have my CV in front of me. I believe I passed the bar in 1985. I'm not sure of the exact month. After I graduated from law school I spent one year with the Office of the Appellate Defender in South Carolina doing appellate work. I then clerked for a Judge Swelb. He is now on the District of Columbia Court of Appeals. At that time he was a trial judge in the District of Columbia courts.
I following that was employed by the Legal Aid Bureau for roughly a year and a half, a little under two years. I was assigned there to a division of the Legal Aid Bureau known as the Prisoner Assistance Project where I did civil and administrative legal work. And in January of 1988 I joined the Office of the Public Defender and was assigned to Baltimore County which is where I have been employed since that time.
Q Did you represent Kevin Wiggins in his trial in

this case?
A Yes, I did.
Q How many capital trials had you had before you represented Mr. Wiggins?
A None.
Q How long had it been since you started public

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defender service that you began to work on Mr. Wiggins case?
A Well, I began with the Office of the Public Defender in January of 88. I will have to confess to all, I don't think I'm going to be able to give exact dates. It was some time ago. I believe it was right around the time or slightly I guess prior to his indictment on these charges that I was assigned to the case. I don't think I had been with the office -- I think it was less than a year.
Q Okay. And you testified that you hadn't worked on any capital trials prior to that?
A Not capital trials. I had been involved in working on capital appeals in South Carolina, doing legal research on appellate court.
Q But no trial work?
A No.
Q Okay. How many felony jury trials had you done before you began your representation of Mr. Wiggins?
A I believe I had had -- well, I know I had had one. I remember clearly it was a subsequent offender, three time loser case and I had co-counsel in that case but I did do roughly half of the trial. It is possible I had one other jury trial, although I'm just not positive about the date. But it was no more than that. I had very limited jury trial experience at the time.
Q Okay. You had a co-counsel in Mr. Wiggins's

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case as well?
A Yes, I did.
Q That was?
A Carl Schlaich.
Q And I gather that there came a time that Mr. Schlaich left the Baltimore County Public Defender's office and went to a different office, is that right?
A Yes, he went to the Harford County Office of the Public Defender.
Q Okay. And during the period before he departed for Harford County, in terms of percentage volume, about how much of the trial preparation work did you perform and about how much did Mr. Schlaich perform?
THE COURT: He is talking about the Wiggins case only.
MR. VERRILLI: Thank you.
A It is hard to give a very firm estimate of that. We did different things. He was lead counsel on the case in the beginning. My primary -- at the beginning I primarily followed directions. I did a lot of legal research. I prepared motions. I think I probably prepared the bulk of the motions filed in the case. I was not involved in the process of securing experts. He would tell me -- I mean I would hear from him --
Q He did that?

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A Yes.
Q He testified it was about fifty/fifty. Do you agree with that?
MS. BROBST: Objection.

THE COURT: Sustained.
Q Was it about fifty/fifty before he left for
Harford County?
A I guess that is a reasonable approximation.
Honestly, I can't speak to how much of his schedule he
devoted.
Q After he left for Harford County did you assume
more of the burden?
A Yes.
Q Considerably more of the burden?
A Yes.
Q Okay. Let's start with the trial itself, the
guilt/innocence trial. As you understand it, what was the
prosecution's theory of the case at guilt and innocence?
A As I understand it, the prosecution's theory of
the case was that Kevin Wiggins, who was employed I believe by
a subcontractor that was working at this apartment complex
where Miss Lacs who was the victim of the crime lived, my
understanding of the theory was that he had gone in there on I
believe it was the 15th of September. Again, I can't vouch
exactly for these dates. It has been a long time. And that

they were proceeding on a felony murder theory which also
qualified him for the death penalty and the theory was that he
had gone in there and killed her in the course of robbing her.
Q Okay. On the 15th of September?
A Yes.
Q And that is 1988?
A Yes.
Q What was the defense theory?
A Well, the defense theory was that -- it had come
to my attention after going through some discovery materials

provided to me that there was a woman who was a friend of Miss
Lacs, I believe her name was Vassar, Edythe Vassar, I believe,
who had evidently told the police -- I believe Miss Lacs body
was discovered on the 17th.
THE COURT: Her what was discovered?
THE WITNESS: Her body. Apparently Miss Vassar
had told the police on the 17th, some time in close proximity
to just after the body had been discovered, that she had
spoken with Miss Lacs the day before, on the 16th, which
obviously was inconsistent with her being dead on the 15th.
So that was obviously an issue in the case not
only as to the State's theory of criminal agency but as to the
first degree issue in sentencing.
Q Was it also your theory that she was not dead on
the 15th, Miss Lacs, is that your defense theory, because of

that conversation on the 16th?
A Well, it was that and we also had retained an
expert by the name of Rudiger Breitenecker who was an expert
in forensic pathology. We had taken all of the materials
received in connection with the autopsy and reports and had
consulted him with respect to his opinion on time of death and
he, when he spoke with us, had supported our theory with
respect to the time of death issue.
Q Okay. And the theory was that the time of death
had to be after the 15th, is that right?
A Yes.
Q Was Miss Lacs body found in her apartment?
A Yes, it was.
Q Was there any evidence introduced at trial that
Kevin Wiggins ever entered that apartment?
A I don't believe so. I believe the State

17 produced evidence that a teenage -- I think it was a teenage
18 girl who had identified him as being in a hallway area, sort
19 of across the way from Miss Lacs apartment. I don't think
20 anybody -- I have no memory of any evidence that he enetered
21 the apartment.
22 Q Was there any fingerprint evidence in the
23 apartment indicating that Kevin Wiggins had been in the
24 apartment?
25 A No.

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1 Q Was there any fingerprint evidence indicating
2 that other people had been in there?
3 A I believe there were latest prints recovered
4 from the scene which if my memory serves me correctly were not
5 accounted for.
6 Q But they were accounted for to the extent that
7 they didn't match Kevin Wiggins?
8 A Yes, but not otherwise identified.
9 Q Were any hair or clothing samples found in Miss
10 Lacs apartment?
11 A I'm sorry. Hair or what?
12 Q Clothing samples.
13 A No, not that I'm aware of. I know there was a
14 cap recovered behind the door and I believe -- I may have
15 filed motions or I may have asked people in the Crime Lab with
16 respect to whether there were any hairs or fibers recovered.
17 I believe I was told there were not.
18 Q Okay.
19 A I know that the police had made efforts to
20 connect Mr. Wiggins to that hat, but that that had not been
21 successful.
22 Q Okay. Now, I take it from your testimony before

23 that time of death was a very important issue at the trial?
24 A Well, in my view it was.
25 Q And in your view it was an important issue?

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1 A Yes.
2 Q Very important?
3 A Yes. I mean, it was essentially the gravamen of
4 the defense.
5 Q Okay. I'm going to hand you a document that has
6 been marked for Identification as PC-Number 5. I ask you to
7 take a look at that for a moment. Have you had a chance to
8 review it?
9 A I haven't read the whole thing.
10 MR. VERRILLI: Your Honor, I believe this
11 document is already a matter of record in these proceedings.
12 THE COURT: Do you remember seeing this before?
13 THE WITNESS: It looks familiar. It is the
14 affidavit in support of the search and seizure warrant.
15 MR. VERRILLI: I propose to ask the witness some
16 questions.
17 THE COURT: She says she is familiar with it. Go
18 ahead.
19 MR. VERRILLI: Thank you.
20 Q Miss Nethercott, could you read the first
21 sentence of the second paragraph on the first page -- I'm
22 sorry. Before we do that let's identify this for the record.
23 What is this document; what does it appear to be?
24 A It appears to be an affidavit in support of an
25 application for search and seizure warrant.

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Q Who signed the affidavit?
A It was signed by a Detective Crabbs.
Q Is that a signature under oath?
A Yes.
Q Okay. Now can you tell that from the document?
A Because it says below his signature, "sworn to me and subscribed to me in my presence, this 7th day of October, 1988." And a signature line below that, Judge Brennan.
Q Doesn't it say the 17th day of October?
A Yes.
Q Okay. And that is on page 5 of the document?
A Yes.
Q Okay. So this document is an affidavit by Detective Crabbs. Could you now read that first sentence and in the second paragraph on the first page?
A "Between the hours of 10:30 a.m. on September 16th, 1988 and 1:30 p.m. on September 17th, 1988 Florence Georgiana LaxLacs's was" and then there is a phrase that is crossed out, "sexually assaulted and murdered by being forcibly drowned and physically -- do you want me to keep going?
Q That is enough. That says that Miss Lacs was murdered between the hours of 10:30 a.m. September 16th and 1:30 p.m. on September 17th?

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A That is what that says.
Q It is a sworn assertion?
A Yes.
Q Is that statement inconsistent with the

prosecution's theory of this case?
A It would seem to be.
Q Because?
A Because my understanding of the theory was that the murder and the robbery had occurred at the same time and the only evidence placing Mr. Wiggins near the crime scene was on the 15th.
Q Okay. Now, was that statement that the murder occurred on the 16th or the 17th consistent with the defense theory of the case?
A Yes.
Q Okay. Do you recall Detective Crabbs testifying in this case?
A Yes, I do.
Q For the prosecution?
A Yes.
Q You didn't ask him about this statement?
A I don't recall whether I did or not. I would defer to the transcript.
Q Okay.
A I may not have.

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Q But you don't remember making a decision not to ask him about this statement?
A No.
Q And --
A I would assume I would ask him about it.
Q Could you repeat that?
A I said I would assume that I would have asked him about it.
Q Okay. Had you been aware of it, you would have asked him? Had you noticed that sentence you would have asked

him about it, is that a fair statement?
A Yeah. I mean, I would assume that I had noticed
it.
Q Okay. You don't recall whether you asked him
about it?
A I honestly don't recall.
Q Okay. And do you recall giving any
consideration to introducing this document as substantive
evidence in support of your case?
A No, I don't remember -- I don't recall -- no, I
do not specifically recall that.
Q Do you have any general recollections about
that?
A Not really, no.
Q Okay. Given that time of death was an important

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issue at trial, is it your opinion that expert testimony on
the time of death was important at the guilt/innocense phase?
A It was my opinion, yes.
Q Why do you hold that opinion? What is the basis
for it?
A Well, first of all I don't think that -- I mean,
as to a medical determination on time of death, it seems like
it is clearly something that is within the parameters of an
expert needing to speak to that issue, at least to determine
the physical condition of the body and various other
conditions that may have a bearing on it. Also because it was
-- it would have supported the testimony of a civilian witness
who was a friend of the victim's and not, in my judgment,
based on my interactions with her, someone who relished the
prospect of assisting the defense. But it clearly would
buttress any attack on a civilian witness that somehow she had

this wrong or her memory was impaired.
Q And that would explain why expert testimony
would be important to the defense case?
A Correct.
Q Did the prosecution put on expert testimony as
to time of death at the guilt/innocence phase?
A Well, they attempted to.
Q Who did they call as a witness?
A They called a medical examiner by the name of

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Doctor Margerita Korrell.
Q Okay. Did you have an occasion prior to the
trial at guilt/innocence to speak with Margerita Korrell?
A Yes, I did.
Q Do you remember exactly when that was?
A I don't recall the exact date. I think
initially Mr. Schlaich and I had intended to go down and speak
with her together. It never worked out scheduling wise.
Again, I don't recall the exact date but it was sometime
within roughly two to three weeks prior to the trial date I
did go down. I met with her at the Medical Examiner's office
and I discussed this issue with her.
Q Okay. I'm going to show you a document which
has been marked for Identification as PC-6. I would ask you
to take a minute and review that, please.
A These are my notes.
Q Could you identify this document for the record?
A There are four pages of notes which aren't kept
as well as they probably should have been.
Q Did you prepare these notes?
A Yes, it is my handwriting.
Q When did you prepare the notes?

23 A The notes are dated 18th of July of 89.
24 "Meeting with Dr. Korrell at the Medical Examiner's Office."
25 Q Okay. Does that mean that you prepared the

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1 notes on the 18th of July, 1989?
2 A Assuming I wrote the date down correctly.
3 Q Okay. Now, does this document refresh your
4 recollection as to when that meeting with Dr. Korrell
5 occurred?
6 A I assume it would have occurred on the 18th.
7 MR. VERRILLI: Your Honor, I would at this time
8 move the admission of this document into evidence.
9 MS. BROBST: Objection.
10 THE COURT: Overruled. Put it in.
11 (WHEREUPON, the above referred to document was
12 entered in evidence as Petitioner's Exhibit
13 Number 6.)
14 Q Can you describe the substance of your
15 conversation with Dr. Korrell on the 18th of July, 1989?
16 A Well -- yes, I can.
17 Q Could you do so, please?
18 A I --
19 Q Let me start with the background. Did you go
20 see Dr. Korrell?
21 A Yes, I did.
22 Q Was that at her office?
23 A Yes.
24 Q Now, can you describe the substance of the
25 conversation that occurred at her office on the 18th of July,

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1 1989?
2 A Well, I talked with her about the autopsy that
3 she had performed on Miss Lacs. I reviewed with her the notes
4 of Dr. Felzenberg who was the local medical examiner who would
5 have been the first on the scene from the Medical Examiner's
6 Office to examine the body and I assume to pronounce the
7 person dead and make arrangements to have the body transported
8 to the Medical Examiner's office. I went over with her the
9 contents of that.
10 I went over with her -- I asked her whether it was
11 possible for her to render an opinion regarding the time of
12 death. I went over with her the various considerations that
13 would go into that. I asked her if she had an opinion on it
14 and she said she did.
15 Q Did she express an opinion to you?
16 A Yes, she did.
17 Q What was the opinion she expressed? This is on
18 the 18th of July, 1989.
19 A She indicated to me that in her judgment the
20 victim could not have been dead more than twenty-four hours
21 from the time of the discovery of the body.
22 Q Do you remember when the body was discovered?
23 A I have written in my notes approximately 4 p.m..
24 Q On what date, do you know?
25 A On the 17th.

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1 Q Okay. So is it an accurate recap, the testimony
2 you just gave, that Dr. Korrell told you at this meeting on
3 the 18th of July that the victim, Mrs. Lacs, could not have
4 been dead more than twenty-four hours before 4 p.m. on the

5 17th? In other words could not have been dead before 4 p.m.
6 on the 16th?
7 A Yes.
8 Q Okay. Was she definitive about that?
9 A Yes. She didn't express any ambivalence. In
10 fact, I asked her. I repeated the question. I said I wanted
11 to be sure. And she didn't express any reservation.
12 Q I just want to make sure --
13 THE COURT: Could not have been dead more than
14 twenty-four hours before 4 p.m. on the 16th.
15 MR. VERRILLI: On the 17th, Your Honor.
16 THE COURT: Okay. Let me see. On 9-17-89.
17 MR. VERRILLI: Right. That was the date the body
18 was discovered.
19 THE COURT: Fine. When did you meet with the
20 doctor?
21 THE WITNESS: Your Honor, I don't recall the
22 exact date. I would assume that I met with her on the 18th,
23 which is what --
24 THE COURT: The 18th of?
25 MR. VERRILLI: Of July.

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1 THE, COURT: Which is the first date on the top of
2 your notes?
3 THE WITNESS: Yes, assuming I wrote the date down
4 correctly.
5 THE COURT: Thank you.
6 Q Now, I want to make sure this is clear. Did Dr.
7 Korrell tell you at this meeting on the 18th that she just
8 couldn't tell what time of death was?
9 A No, she never indicated that.
10 Q So it was not her assertion to you that she just

11 couldn't tell?
12 A No.
13 Q She thought she could tell?
14 A Yes, she gave me the opinion. She stated it at
15 least twice, if not three times.
16 Q That opinion was unequivocal?
17 A At that time, yes.
18 Q It was reflected in these notes that you made
19 contemporaneous?
20 A Correct.
21 Q Did you have another occasion to talk to Dr.
22 Korrell prior to trial?
23 A Yes, I did.
24 Q Do you remember when that was?
25 A Dr. Korrell called me shortly after that

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1 meeting. My notes reflect here it was the 20th, which would
2 have been two days later. She called me at my office and was
3 extremely agitated and she was somewhat difficult to follow,
4 but the essence of the conversation was that she had discussed
5 this autopsy with her supervisor and that she was retracting
6 the opinion that she had given me with respect to the time of
7 death in this case.
8 She wouldn't -- when I asked her why this -- what
9 had occasioned this reconsideration of the issue she wouldn't
10 answer how it came about. I asked her several times at whose
11 initiative did it come about and she wouldn't answer.
12 Q Okay. Now, did Dr. Korrell in fact testify for
13 the prosecution at the guilt/innocence phase?
14 A Yes, she did.
15 Q And do you recall what testimony she gave with
16 respect to time of death at the guilt/innocence phase?

17 A My recollection is that she testified it was
18 impossible to give such an estimate.
19 Q Is that --
20 A Or that -- I don't want to misstate it, but in
21 effect she was not able to render an opinion. She could not
22 render an opinion on this question.
23 Q In your judgment, Miss Nethercott, did the
24 statement that Dr. Korrell made to you on July 18th contradict
25 the testimony that she gave at trial at the guilt/innocence

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1 phase?
2 A You mean the statement that she made to me at
3 the Medical Examiner's office?
4 Q The statement made on July 18th reflected on
5 Page 1 of your notes on this document, did that statement
6 contradict the statement and testimony that she gave in the
7 trial?
8 A Yes, in my judgment it did.
9 Q Now, did you give any consideration to serving
10 as a witness for Mr. Wiggins on the question of Dr. Korrell's
11 prior contradictory statements as to time of death?
12 A Well, yes, I did give the matter consideration.
13 What happened was once I found out that this retraction had
14 occurred -- before this meeting with her, when I spoke with
15 Dr. Breitenecker, he had advised me that he was willing to
16 testify on the time of death issue but he didn't think it
17 would become necessary because he did not anticipate that the
18 Medical Examiner's office would have an opinion that differed
19 substantially from his.
20 When I learned of this change in Dr. Korrell's
21 opinion I contacted Dr. Breitenecker who at that time apprised
22 me that he did not intend to testify.

23 Q Did he explain why not?
24 A Not very clearly. He made a comment about his
25 involvement in serving for, doing rape examinations for the

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1 State Attorney's office. He didn't say that was the reason.
2 He mentioned that and just basically said he wasn't -- he
3 didn't want to be involved in testifying.
4 Q Okay. We are going to go into that subject more
5 in a minute. I'd like to stay focused on the fact that you
6 considered giving testimony.
7 A That is what occasioned --
8 Q At that time you considered whether you should
9 testify as a witness, is that right?
10 A Yes.
11 Q Okay. Did you in fact testify as a witness at
12 trial?
13 A No, I did not.
14 Q Why did you decide not to?
15 A Well, I was concerned about what had happened.
16 If I can, at least from my perspective -- at this point I was
17 less than three weeks away from trial and in a capital
18 homicide which at that point represented at least maybe my
19 second or, possibly, if I'm wrong in my recollection, there
20 was one more, my third jury trial. I was handling the bulk of
21 the case at that point. I was frankly overwhelmed and very
22 shortly before the trial date the essence of the defense
23 appeared to be literally falling apart. I had gone from a
24 situation where I had an expert who I thought would be
25 agreeing with the State's expert and supporting the testimony

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of a civilian witness to a situation where I didn't have that at all. And I was concerned about the whole manner in which this had occurred with Dr. Korrell and --
Q When you say that, you mean her changing her mind?
A Yes, I was concerned enough that I discussed it with Mr. Saunders who was the District Public Defender for Baltimore County at that time. I mentioned -- I discussed with him at that time.
There were other things that had occurred in the case and seemed as though I was getting dangerously into a situation where I was in effect becoming a witness.
Q On this issue of time of death?
A Correct.
Q Okay. And did you discuss that with Mr. Schlaich, your co-counsel?
A Yes.
Q And did you eventually reach a decision that you would not offer this testimony as to time of death, you personally?
A Well, I was operating on the assumption, which may be incorrect, that I could not function both as counsel and as a witness. I at that time, given everything that was occurring in the case, it seemed to me that in the first place probably a postponement request would have been a logical

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thing to do.
Q Did you do that logical thing?
A No, I did not.
Q Okay. I'm sorry. Did you want to keep going?

Let me ask you this. Did you -- you said that you assume that you would have to recuse if you were to serve as a witness on this issue?
A Yes.
Q Did you research that question before making a decision?
A No.
Q Did you look at the Maryland Rules of Professional Conduct?
A I don't recall doing that. I think frankly I saw that as just a practical, just not something that practically speaking was viable.
Q But you didn't look into it. So you don't know what Maryland ethics rules are in that regard, of whether a lawyer can continue to represent a client and also serve as a witness?
A Well, my understanding was that that is generally not approved of.
Q But do you know what Maryland Rule of Professional Conduct 3.7 says?
THE COURT: Did you look at it at the time?

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THE WITNESS: No, I didn't, Your Honor.
THE COURT: You don't know what it says?
THE WITNESS: I can't quote it for you.
THE COURT: It says a lot different than what it said then. Go ahead.
Q In deciding this question of whether you should be a witness or not, whether it would force a recusal, did you factor in that this was going to be a Judge trial rather than a jury trial with respect to guilt and innocence?
A My testifying?

11 Q Yes. Did that have any bearing on your
12 consideration of whether you would be forced to recuse?
13 A Well, no. I think more the issue with respect
14 to my recusal was -- I think it had to do with the issue of
15 getting the case postponed. At that time I had taken primary
16 responsibility for preparation of the case on guilt/innocence
17 and --
18 THE COURT: Here is his question. You didn't
19 look at the rule?
20 THE WITNESS: That's correct.
21 THE COURT: So you are not aware of whether the
22 former rule differentiated in determining whether a lawyer
23 should testify as to whether it is a judge trial or a jury
24 trial?
25 THE WITNESS: That's correct, Your Honor. I did

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1 not research it.
2 Q Remember now, you also said that you had the
3 opinion and feeling that it was wrong?
4 A Yes, for reasons other than ethical reasons. I
5 didn't see it as --
6 THE COURT: All right. But any reasons that you
7 had in your head and your heart, were those reasons the same
8 whether it would be a judge trial or a jury trial? Did it
9 matter in your reasoning as to whether or not it would be a
10 judge or jury trial that you would not testify and be an
11 attorney at the same time? Did you give any of that any
12 consideration?
13 A I think it would have occurred to me that it
14 would be particularly awkward in front of a jury.
15 Q But you were proceeding in front of a judge?
16 A I don't know at that time that decision had been

17 made.
18 Q Okay. Anyway, let's skip ahead a little bit.
19 Dr. Korrell's admission to you was never introduced as
20 evidence at the guilt/innocence phase?
21 A I don't believe it was.
22 Q Nor at the sentencing phase?
23 A No.
24 Q In fact, Dr. Korrell wasn't even cross examined
25 about that prior statement, was she?

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1 A I don't believe she was. I don't believe I
2 conducted the cross-examination of Dr. Korrell.
3 Q Who did?
4 A I believe Mr. Schlaich did.
5 Q Can you describe the circumstances surrounding
6 that, the decision to have Mr. Schlaich do it?
7 A Well, I was taking the primary responsibility
8 for the conduct of most of the examination of the witnesses.
9 I was operating on the assumption that I would do the
10 cross-examination of Dr. Korrell and he indicated to me
11 shortly before she testified that he was going to conduct
12 cross-examination.
13 Q How soon before?
14 A I think it was literally just really as we were
15 sitting at counsel table, I believe.
16 Q When Dr. Korrell was testifying on direct
17 examination?
18 A Yes.
19 Q That is when you became aware that he was going
20 to --
21 A No. As she took the witness stand.
22 Q I see. And your recollection is that Mr.

23 Schlaich did not question her about this prior admission?
24 A That is my recollection. Again, I would defer
25 to the transcript.

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1 Q Okay. Do you think, Miss Nethercott, that it
2 was important for Mr. Wiggins to have expert testimony for the
3 defense with regard to time of death? If you had proceeded by
4 jury trial instead of by judge trial at the guilt/innocence
5 phase of these proceedings, would Mr. Wiggins have had the
6 benefit of an expert with respect to time of death?
7 A Well, he wouldn't have unless we had gotten a
8 postponement of the trial date.
9 Q Can you explain why that is?
10 A After this -- after Dr. Korrell's refashioning
11 of her opinion and our expert announcing that he wouldn't
12 testify, I basically began telephoning all over the country in
13 an effort to locate a forensic pathologist who could render an
14 opinion on the matter. The only person I was able to locate
15 was an individual whose scheduling was not available during
16 the relevant period of time that would have run or our best
17 estimate would have run if we had elected a jury.
18 Q Was that Dr. Kaufman?
19 A Yes.
20 Q Just so I understand your testimony correctly,
21 if you had gone with a jury trial instead of a judge trial,
22 Dr. Kaufman wouldn't have been available?
23 A That was clearly my understanding, yes.
24 Q You didn't have any alternative to Dr. Kaufman?
25 A No.

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1 Q Did you consider seeking opinions at that point
2 to get an expert who could testify --
3 A Did I consider it? Yes.
4 Q But you didn't do it?
5 A No.
6 Q Why not? You mean the defense team didn't do
7 that?
8 A No.
9 Q Okay. You did, I take it, recommend to your
10 client that he seek a judge, go with a judge trial rather than
11 a jury trial?
12 A Yes.
13 Q And was your inability to line up an expert
14 witness in the event your client wanted a jury trial a
15 material reason for you giving that advice to your knowledge?
16 A It was in my judgment.
17 Q Was it a material reason?
18 A Yes.
19 Q Did you put any pressure on Mr. Wiggins to make
20 the decision to opt for judge trial other than jury trial?
21 A I don't know what you mean by pressure. We
22 encouraged it, yes.
23 Q How strongly did you encourage it?
24 A Well, frankly I didn't do most of the talking
25 during that conversation.

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1 Q Were you present?
2 A Yes, I was.
3 Q Well, what happened? How strongly was it
4 encouraged?

A It was encouraged.
Q Strongly?
A I would -- yes, I would say strongly is a fair characterization of it.
Q Based on your prior experience dealing with Mr. Wiggins do you think that he was vulnerable to pressure from you, from his attorneys?
A I think Mr. Wiggins had a very limited -- it became obvious to me as my contacts went on that he had I think a cognatively or intellectually limited appreciation of the situation. To that extent I think there was some vulnerability.
Q So was that a yes answer to my question?
A In that sense, yes.
Q Okay. I'd like to turn now to the jury composition issue.
THE COURT: Wait a minute now. Wiggins had cognative limitations, so yes as to the pressure. All right. What is the issue?
MR. VERRILLI: Jury composition.
THE COURT: What number?

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MR. VERRILLI: I'm sorry, Your Honor. This would be an ineffective assistance of counsel claim both with respect to guilt and innocence, which is number 8 and I guess this is number 9 with respect to guilt and innocence and then 36.
THE COURT: Systematic exclusion of African Americans from the jury selection process.
MR. VERRILLI: Right. This also goes to claim number 36, Your Honor, 36 D in particular.
THE COURT: 36 what?

MR. VERRILLI: D as in David.
THE COURT: 36 D is counsel failed to investigate the case properly and produce information as to the systematic exclusion of African Americans.
MR. VERRILLI : Right.
THE COURT: 9 is there was a systematic exclusion of African Americans from the jury selection process utilized in Baltimore County at the time of the trial. So far I see Mr. Schlaich's testimony on that point. All right. Go ahead.
MR. VERRILLI: Thank you.
Q The defense entered an objection at the sentencing phase of the proceeding to the systematic exclusion of African Americans from the jury pool, is that right?
A Yes.
Q But the defense did not submit any evidence in

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support of that claim?
A That's correct.
Q And that is because the defense did not develop any evidence as far as that?
A That's correct.
Q And the defense understood that that claim was meritless unless there was evidence to support it?
A Yes.
Q But nonetheless the defense didn't develop the evidence?
A That's correct.
Q And there was no rule or regulation of the Public Defender's Office that prohibited the defense from developing that evidence?
MS. BROBST: Objection. Relevance.
THE COURT: Overruled.

A Not that I'm aware of. I recall raising that
issue as an issue that I was aware of. I recall there was a
discussion between Mr. Schlaich and I about that and my
recollection is that he had indicated that in a recent case,
some recent capital case, that some type of study or
investigation had been done with respect to this and that it
had not yielded anything and therefore that it wouldn't be
something that would be productive. But we both realized that
that claim would not be preserved without an evidentiary

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showing.
Q Did you get that other study from the other case
that Mr. Schlaich referred to?
A No. Well, I never saw it. I can't speak for
him.
Q Now, there are funds available to hire an
expert to do a study, correct, funds available from your
office?
A As far as I know, yeah.
Q And did any of your superiors in the Public
Defender's Office forbid you from developing a study?
MS. BROBST: Objection. Relevance.
THE COURT: Overruled.
A No, not that I was aware of.
Q Okay. Let's turn now to the issue of mitigation
and sentencing.
THE COURT: Okay. What number?
MR. VERRILLI: This would be number 36 A, 36 B,
36 C.
THE COURT: I have 36 C, D and E but nothing
else.
MR. VERRILLI: I'm sorry --

THE COURT: Wait a minute. That is just my
expanded copy. The ones I handed out to you, we expanded
those. Here it is. 36 A. Counsel failed to introduce

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evidence showing the petitioner was mentally ill, homeless and
a victim of a horrible childhood.
What else is there, B?
MR. VERRILLI: B and C.
THE COURT: Counsel failed to conduct an adequate
investigation of the case to develop -- what is wrong with
that?
MR. VERRILLI: Shouldn't be an E at the end of
develop, I guess.
THE COURT: Evidence of mental retardation. The
homeless -- I wonder why the word processor didn't pick that
up? I don't know. The homeless living condition of the
petitioner and his horrible childhood. Counsel failed to
introduce available expert testimony on the issues of mental
retardation, homelessness and horrible childhood of the
petitioner. All right.
MR. VERRILLI: Okay.
Q It is correct, is it not, Miss Nethercott, that
the defense team did not develop a social history of Mr.
Wiggins in preparation for sentencing phase of these
proceedings? Let me ask it this way. It is correct that the
defense team didn't hire a forensic social worker to do a
social history?
A I don't believe so.
Q Okay. And funds were available for that purpose

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from the Public Defender's office?
A I would assume. I was -- as I said earlier, I
was not -- I really did not have any role in seeking funds
or seeking persons to do the expert --
Q That was Mr. Schlaich's responsibility?
A I don't have any information to suggest there
was.
Q That was Mr. Schlaich's role?
A Yeah. I was not involved in that.

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[WITNESS: MS. NETHERCOTT; BY MS. BROBST:]
Q No social worker or psychiatrist or psychologist
were called to testify in this case regarding the defendant's
background at sentencing, is that correct?
A You said social worker or?
Q Psychiatrist or psychologist?
A Correct.
Q Have you in your experience seen or been
involved in a case in which social background of the defendant
has backfired on the defense?
A Have I personally been involved in that?
Q Or observed?
A Yes.
Q And when a social workup is done and testified
to, the State has an opportunity to cross examine of course,
is that correct?
A Sure.
Q And often will bring out every bad thing the
defendant ever did regardless of whether it resulted in a

conviction, is that correct?
A I'm sure that is usually what they would hope to

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do.
Q Okay. And you felt, you testified on direct,
that the time of death was the most important consideration in
the defense case, is that correct?
A Given the defense strategy that we had adopted,
yes, it clearly was.
THE COURT: And just to make sure. I asked this
question once before. But the time of death was important
because of the ability or not of the State to put Mr. Wiggins
near the crime scene?
THE WITNESS: Well, the importance was that they
would have to put him at the crime scene at a time that was
consistent with her dying. The problem was they put him at
the crime scene on the 15th. The evidence on time of death
suggested that she was alive beyond the 15th. So it created
problems both on guilt/innocence and as to principalship.
THE COURT: But again, the issue of time of death
had to do with their ability to put him at the crime scene at
that time? In other words, if the time of death was one
thing, they couldn't put him there. If the time of death was
another thing, then they could put him there?
THE WITNESS: Yes, if I understand your question,
yes. If they could have her dead at the one time they were
able to put him there, which was the 15th, that would be
consistent with the theory.

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THE COURT: So that was what the case was all

about, the State had testimony that they could put Wiggins there at a certain time, right?
THE WITNESS: At the apartment complex.
THE COURT: So this whole issue of death and the time of death had to do with a coordination of whether death occurred at or near the time they could put him at the crime scene?
THE WITNESS: Yes, whether the death was connected up into the same timeframe with any taking that may have occurred.
THE COURT: Because if they could put him at the crime scene only three days before the time of death, we probably wouldn't be here today, something like that?
THE WITNESS: The way this case went, Judge, I hazard to guess what would have happened.

* * * *

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In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
Post Conviction Hearing
Volume 4

March 29, 1994
Towson, Maryland

Before:
Honorable John F. Fader, II, Associate Judge

* * * *

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THE CLERK: State your full name and current address for the record, please.
THE WITNESS: My name is Gerald Fisher. I'm an

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attorney and my office address is 419 7th Street Northwest Suite 201, Washington, D.C..
MS. BROBST: Your Honor, the State objects to the calling of this witness for reasons previous submitted on a motion in limine.
THE COURT: Which had to do with the fact that I'm supposed to be the one to make a determination as to whether someone has been incompetent or-not.
MS. BROBST: That's correct, Your Honor. That

this witness does not have an expertise available that would help in this case the trier of fact in any manner since the trier of fact is the trial judge of the Circuit Court for Baltimore County.
THE COURT: Well, I'm going to listen to him and let me explain why for the record. I sit here as far as I know probably as the trial judge who has handled more death penalty cases than any other judge in the State of Maryland. I have four. I don't know anybody else that has that many, do you?
MS. BROBST: No, sir.
THE COURT: So I have handled more than anyone else. But what has happened to me is that I have been acutely aware of the fact as I have been involved with this, as this is my second or third post conviction in a death penalty case, but I have become acutely aware that in this area more than

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any other area there is one big difference in sitting out here on the bench and making a judgment on matters as opposed to what should be done by an attorney in preparation for presenting those matters to the court.
I dare say that I am convinced that I am not an expert on the workup in the cases and what needs to be done. While I may have more trial experience than any other judge in the state in trying the case, I have come to understand through reading post conviction decisions that I am not an expert and do not have a good handle and a good grasp enough to be the sole judge as to what attorneys should do in evaluating a case and presenting sociological and psychological work-ups. For that reason this gentleman's testimony could be beneficial to me. I will listen to it.
DIRECT EXAMINATION

MR. VERRILLI :
Q Mr. Fisher, I have handed you a document which has been marked for Identification as PC-8. Do you recognize that?
A Yes, I do.
Q What is that?
A That is a resume that I have. I have a couple of different ones for different purposes, but that is my resume.
Q Did you prepare it?

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A Yes, I did.
MR. VERRILLI: I move the admission of PC-8.
MS. BROBST: No objection.
THE COURT: Put it in, please.
(WHEREUPON, the above referred to document was entered in evidence as Petitioner's Exhibit Number 8.)
Q Mr. Fisher, could you describe your educational background, please?
A Yes. I graduated from college in 1972 at the College of William & Mary. I graduated from law school and actually I completed class in 1977 and formal graduation was from 1978 from Catholic University law school, Columbus School of Law. That is it as far as formal education.
Q Are you a licensed attorney?
A Yes, I am.
Q In what jurisdictions?
A In several. I'm licensed to practice in Virginia, Maryland, the District of Columbia and I'm also licensed to practice in circuit courts in other jurisdictions: In the 5th Circuit, the 11th Circuit, 9th Circuit and 4th

22 Circuit, which takes us beyond Maryland and Virginia.
23 Q Okay. Can you give us your employment history
24 since law school, please?
25 A Yes. When I graduated for a few months I worked

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1 with a private attorney who specialized in criminal defense
2 work. Then beginning in the summer of 1978 I clerked with a
3 judge for the District of Columbia Court of Appeals, Judge
4 Walter Yeagley. I did that for approximately eleven months.
5 And then in 1979 I began working at the District of Columbia's
6 Law Students in Court program as a clinical supervisor. It
7 also provides adjunct professor status at a number of law
8 schools.
9 What that program does is third year law students
10 in the District of Columbia are allowed to practice law under
11 the supervision of attorneys who have been licensed to
12 supervise them. And I worked primarily with the criminal
13 division in the first years supervising and teaching criminal
14 law and criminal trial techniques to law students.
15 I have continued doing that, although I no longer
16 do it on a full-time basis. It is a part-time matter for me
17 now and what I do full-time is to practice privately in my own
18 law firm. I began doing that roughly in 1984.
19 I moved gradually from a full-time to a part-time
20 basis in the Law Students in Court program and then was going
21 into full-time practice. I have been doing that, again, since
22 approximately 1984 or 1985.
23 My practice is a litigation practice with the
24 emphasis on criminal law and with I guess you would call it a
25 sub-specialty dealing with capital punishment litigation.

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1 In addition, I teach independently of the Law
2 Students in Court program two courses at Georgetown's law
3 school, one is a trial practice course and it is both civil
4 and criminal, and the other is a course in capital punishment
5 and the Supreme Court. It is a substantive look at capital
6 punishment litigation.
7 Q Can you estimate for us the number of criminal
8 trials in which you have served as counsel?
9 A Cases of my own, probably forty to fifty. As a
10 supervisor in the Law Students in Court program I probably did
11 an additional one hundred or two hundred cases that we went to
12 trial.
13 I should explain. The way it works is the
14 supervising attorney is by obligation has to be co-counsel in
15 the case. So we would be co-counsel with the students. It
16 would be the students primary responsibility to conduct the
17 case but a lot of times that didn't work out that way. So we
18 had equal responsibility in terms of what went on with the
19 cases.
20 Q Okay. Can you now describe your litigation
21 experience in death penalty cases?
22 A Sure. Beginning in I think it was 1983 I
23 started to do work on post conviction capital cases in
24 southern states. And the way that that happened is that one
25 of the people I used to work with, an individual named Steven

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1 Bright, went down to Atlanta, Georgia and took over a program
2 there that exclusively dealt with capital litigation in
3 southern states both at trial and post conviction level,
4 although it was primarily post conviction then. I began to

work on some of those cases. Actually even before he left we had begun to co-counsel one case and then he left. We co-counseled another case and then I took a third case with another attorney and then was involved in several other post conviction cases.
Beginning in 1984 or 1985 I began to do capital cases in Maryland both at the trial, post conviction, appellate level. So I have been counsel in about four or five of those cases, counsel of record, and have been involved in probably another, I don't know, ten or fifteen Maryland cases and maybe an additional fifteen or twenty other post conviction capital cases in other states.
Q And in those cases that you are referencing did your work include preparation for trial at sentencing?
A Sure.
Q Go ahead.
A In the cases that we took at the trial level and even the cases we took at the post conviction level we had to do a lot of -- we did fundamental preparation for the cases. In the post conviction cases a number of them that we got involved in were cases where we were in the same

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setting you are here, and then subsequently won relief and went back and did the resentencing or retrial or whatever. So we had to go back and reprepare the cases for either sentencing or for trial.
In addition, even when we were doing the cases themselves just in their post conviction status, we would have to go back and to develop and prove up whatever claims we were making and that took preparation in the same way that you did trial or sentencing preparation initially.
Q Okay. You said you teach a course on capital

punishment at Georgetown Law School?
A Yes.
Q Tell us more about that case?
A Yeah. I think in 1986 I and one of my law partners, Robert Morin, began teaching a course in Georgetown. It is on -- its emphasis is on the Supreme Court decisions on capital punishment.
Part of what we do in the course is we also examine other Federal Court decisions and some state court decisions and then we also try to sort of layer over that a kind of practical lock at how these issues are resolved and how they are litigated at the trial and sentencing and post conviction levels. So we take really both a historical and a subject matter look at capital punishment and put it together as a course.

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We have second and third year students -- I think first year students aren't eligible for the course -- and a number of students at Georgetown who are in LLM courses who take the course.
Q Does your course cover the subject of ineffective assistance of counsel?
A Yes, it does.
Q Are you generally familiar through your litigation and teaching experience with case law, relevant case law in Maryland and from the Federal courts on the issue of ineffective assistance of counsel?
A Yes. In many ways because of that course, one of the subjects that we teach is an independent class which is ineffective assistance of counsel. So we spend a lot of time reading those cases, the ones that lead up to Strickland and what has led up to Strickland in Federal courts and then also

17 through that and through my own work I have read I think all
18 the post Strickland ineffective assistance of counsel cases,
19 at least the ones in capital punishment in Maryland and many
20 of the pre Strickland cases on capital punishments. So I am
21 familiar.
22 Q Which are those Maryland cases generally?
23 A There is Thomas versus State, Harris versus
24 State, Colvin, Trimble, Tichnel, Gillian, Bauers. There is
25 another case in there I think I may have missed. I think

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1 those are the primary ones from 1985.
2 Q Through your litigation and teaching experience
3 are you generally familiar with substantive 8th Amendment law
4 as it applies to the sentencing phase of a capital proceeding?
5 A Yes. Again, probably the primary place where I
6 learned the substantive law was through the development of the
7 class or at least I knew much of it before we put the class
8 together but with continuing emphasis on that. It really is
9 the primary theme throughout the class is the 8th Amendment
10 and its development and all its variables.
11 Then just in doing the capital litigation, it is a
12 fundamental aspect of doing capital litigation. You need to
13 know about that.
14 Q Could you identify some of those leading cases
15 from the Supreme Court?
16 A Well, you know the primary cases just in terms
17 of substantive 8th Amendment law are Furman in 1972 and then
18 in 1976 there is the five major cases, Gregg and Woodson,
19 Roberts, Jurrick -- what is my fifth case there? I can't
20 remember the fifth one for a moment. It will come back. Then
21 all of the development of the case law since then has been 8th
22 Amendment spinoffs and incorporating principles from other

23 areas, from due process, from the 14th Amendment, from the 5th
24 Amendment
25 Q Okay. And the case law on mitigation evidence

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1 at capital proceeding, are you familiar with those cases?
2 A Yes, again, from the first five cases that came
3 out in 1976, the case that really starts the seeds of that is
4 Woodson. Then there is the Lockett case in 1978; there is
5 Ettings which followed shortly after that and then we have
6 Penry (Phonetic) and Franklin and a number of other cases more
7 recently decided that deal with the presentation of mitigation
8 evidence.
9 Q Okay. Do you do any teaching in addition to
10 your Georgetown capital punishment course that involves issues
11 of criminal trial practice?
12 A Yes.
13 Q Would you describe those for us?
14 A I do a lot of teaching in CLE programs,
15 particularly in the District of Columbia. In fact I have to
16 teach one tonight on criminal trial practice and criminal
17 trial techniques in the District of Columbia and elsewhere.
18 I have been on some panels outside of the District
19 of Columbia as well. Plus every year for the last I guess
20 four years now I have gone up to Harvard University as part of
21 their trial advocacy workshop and taught third year students
22 there. They bring in attorneys throughout the country to do
23 that.
24 In addition, I have been on some panels that deal
25 more specifically with capital punishment litigation, one or

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two instances in Maryland and then I have done them at the Earleigh conference, which is the national conference of people doing capital punishment litigation. It is held -- I have been going since 1983 and have been on several panels there. I have also taught on panels and seminars down in Georgia and other southern states.
Q Okay. Let's talk a little bit more specifically about the conferences in Maryland that you have attended. You you were here yesterday for Mr. Schlaich's testimony?
A Yes.
Q And you recall him testifying about a conference at Saint Mary's that he attended?
A Yes.
Q Is that familiar to you, that conference?
A Yes, I was at that conference.
Q Can you detail what happened at that conference as best you recall it?
A Well, I would say his general description was correct. What it was was one of the earliest meetings of people who were doing capital punishment litigation in Maryland to try to have some coherent approach to those cases and to be sure that people were doing things properly in those cases.
Only a few years beforehand they had set up the Capital Punishment Unit from the Maryland Public Defender and

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this conference was really generated by them so that people could learn substantitively and then practically what they ought to be doing.
There were a variety of panels that were

presented, some just dealing with the substantive law itself. You know, here are the decisions in Maryland, here are the decisions in the United States Supreme Court, the 4th Circuit, that pertain to capital punishment litigation. And then there was a great emphasis on how you go about developing these cases and defending your clients.
I would say the strongest emphasis at the conference as it has been virtually every conference I have gone to is the question of mitigation and the sentencing phase because I think really anybody who has been doing this type of work is under the realization that that is where if not you are inevitably, you are very likely to be at a sentencing phase and you need to go with thinking about sentencing from day one in these cases and how you are going to put the sentencing together. That was the strongest emphasis at that particular conference.
There was a lot of talk about mitigation and they brought in specialists, brought in attorneys from other places and that is what went on.
Q Okay. Now, at the conferences that you have attended I gather that the subject of what it takes to be an

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effective lawyer in a capital case was discussed?
A Sure, either directly or indirectly at virtually every conference. It is often times a separate subject matter that is covered and it is something that is underlying every single issue that they talk about because the approach is this is what you have to do in order to effectively represent your client.
Q Okay. Let's talk a little more about the Earleigh conference. You testified that that is an annual conference?

A Yes.
Q Who sponsors that?
A The Legal Defense Fund in New York is the primary sponsor. It has been co-sponsored at different times by different agencies that are involved in capital litigation defense, but primarily LDF out of New York.
What they do is they bring in from throughout the country and in fact even internationally, bring in some people from different European countries every year who participate at the conference, people who are doing capital litigation.
And they have about a three and a half day program of training and presentations and just opportunity to have dialogue with people in the area to talk about the developments in the law, what you need to do, the developments in areas of mitigation that aren't really local developments, but they are

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developments in learning about different things that need to be done and different problems that arise.
It is the most comprehensive conference in the country dealing with capital punishment.
Q How many lawyers attend it roughly?
A I'm sure it is at least two hundred. It may be more. The attendance is pretty high.
Q Where is the conference held?
A It is in Earleigh, Virginia, which is right beyond, a little bit beyond Manassas. I don't know if it is in Prince William County but maybe the next county over.
Q Is it within driving distance to Baltimore?
A Yes. In fact there are a number of people who come from Baltimore from the Public Defender's office, both from the Capital Litigation Unit and then there is the individual public defender offices attend every year.

Q So lawyers from the Maryland Public Defender office routinely attend this conference?
A Yes.
Q Mr. Fisher, are you generally familiar with the defense strategies and techniques in death penalty cases both with respect to guilt/innocence and sentencing?
A Yes, sir, I think so.
Q And I take it that your familiarity is based upon the experience you have described so far?

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A Based upon the experience and I think the one thing that probably has been as important as just my own cases is I spent a lot of time talking with people who do capital punishment litigation. I mentioned my partner earlier, who is probably even more involved in this area than I am; I mentioned Steven Bright and people at LDF that I'm regularly in contact with for a variety of reasons. But we talk about a lot of the cases and what you do and what you don't do.
Q In addition to the cases you have litigated, have you acted as a consultant for other lawyers on capital cases?
A Sure, on a number of cases.
MR. VERRILLI: At this time I would offer Mr. Fisher as an expert on the issues of ineffective assistance of counsel raised in this case.
THE COURT: Do you have any questions to ask him, Ms. Brobst?
MS. BROBST: Yes.
CROSS EXAMINATION (On Qualifications)
MS. BROBST:
Q How many cases have you actually tried at the guilt and sentencing phase, not the post conviction area, but

23 actually tried as first seat in a death penalty or capital
24 case?
25 A Well, all the trial cases that I have had have

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1 been co-counsel cases. That was with purpose. We went in
2 saying we thought it was important to have two attorneys and
3 that they have equal responsibilities.
4 All of the capital cases I have done have been
5 with experienced trial attorneys. There are three cases that
6 have been involved in at the trial level. None of them have
7 gone forward to verdict and then sentencing just because of
8 the way the cases resolved. One of them was actually as we
9 began the trial and as evidence broke we got a plea offer from
10 the State that subjected our client to about fifteen years
11 maximum in the penitentiary and we took that.
12 The other cases, as we began there were workouts
13 right on the eve of trial. So those cases didn't go all the
14 way through to verdict and then to sentencing because we just
15 never had to reach that point.
16 In terms of cases that I have done as far as
17 capital sentencing, I have had two cases -- three cases where
18 we have actually done sentencings off of capital cases either
19 because we picked them up after post conviction or we
20 litigated the post conviction and won and then came back and
21 did the resentencings. We didn't get relief on
22 guilt/innocence on those particular cases.
23 So as I said before, there are five cases really
24 where I think I have been counsel of record in a capital case
25 in Maryland and that is how they resolved. Two or three sort

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1 of worked out at trial and two back on resentencing.
2 I have also been involved just in a number of
3 other cases but not as counsel of record.
4 Q Okay. So you have never tried a death penalty
5 case in Maryland on guilt/innocence?
6 A Never gotten it all the way to verdict on
7 guilt/innocence.
8 Q And you never entered a sentencing proceeding
9 after a guilty verdict in a case in which you have handled?
10 A Not in which I have handled but in cases which
11 other people have handled.
12 Q On three occasions you have been counsel in this
13 co-counsel way in death penalty cases in Maryland at
14 sentencing proceedings?
15 A That's correct.
16 Q What three cases were they?
17 A We did the Mills case. I was also involved in
18 the Trimble case I think that was in front of Judge Fader that
19 Robert Morin had. At one point I was counsel of record.
20 Because the case worked out for other reasons, so we didn't
21 actually do the sentencing. Mr Trimble got resentenced after
22 getting relief on another issue.
23 THE COURT: In what I anticipated and was correct
24 in a distorted, forcing of words by 361 Rowe Boulevard. But
25 we knew that was going to happen. He was the only one on

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1 death row that was under 16.
2 THE WITNESS: There are actually two. The other
3 case I was about to talk about is the Johnson case which I had
4 that was out of this jurisdiction.

THE COURT: So I knew they were going to find a way since the law had changed because they had done that in Doering. So they found a way.
THE WITNESS: Then Mr. Johnson's case we also came back and then what happened is we were all prepared to go forward with the capital sentencing and Mr. Johnson's case, there was the change in the law and then he received relief on that and we did that --
THE COURT: That is pretty consistent because when there is a change in the law they give the benefit to the deathee, so as to speak. So they did the same thing in Doering and in Trimble.
THE WITNESS: That's correct. That case went off -- we resolved that up in Bel Air, up in Harford County in Mr. Johnson's case.
Q Well then I misunderstood you. I thought you said you have tried three sentencing hearings after post conviction or reversal on appeal or whatever?
A No. What I said is I was involved in three cases that were -- that came back for sentencing purposes in which we had to prepare sentencing hearings. It just so

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happened we were on the verge on two of those, Trimble and Johnson, of doing the hearings when we got relief from the, just from legal developments. In Mills we did a full sentencing hearing on Mills up in Cumberland County.
Q So you have tried one death penalty sentencing hearing in the State of Maryland?
A That's correct.
Q As trial counsel?
A Right.
Q Okay. And you have tried no death penalty cases

or sentencing hearings in Baltimore County?
A No, not -- if you count Trimble, it is a Baltimore County case, or if you count Johnson, which was a Baltimore County case that just got moved. But in terms of actually conducting the hearings here, no.
Q And you would agree as a person who considers himself an expert in this area that the way cases are handled also depends on the jurisdiction in which the case is being heard, wouldn't you agree, in certain respects?
A It is a factor. It is not a dispositive factor and I think it is less of a factor in a capital case than it is in other cases because of the particular aspects of capital cases.
Q But for example, the election of court/jury is a function of where you are trying the case, wouldn't you agree;

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you have to know the judge; you have to know what the jury composition is?
A I think that is true anywhere. I don't mean to say it is not something that has to be considered. The point I'm trying to make is what weight we might give that decision in a non-capital case is different than the weight I think you have to give that decision in a capital case because of the consequences and what individual jurors can do in a capital case that they cannot do in a non-capital case.
So it is just different weight. But it is a factor.
Q In addition to the one capital sentencing hearing you have been counsel on in Maryland, have you been counsel on an actual trial of a capital sentencing hearing in any other jurisdiction?
A One. That is a case that came back that I did

17 in the 11th Circuit. That is the Godfrey decision. That case
18 came back -- I don't mean to mislead you. That was a case we
19 came to the sentencing and again on the eve of sentencing we
20 worked out a resolution of the case. So the hearing itself
21 didn't go forward. But again, we were prepared to present the
22 hearing. So it was a workup without the presentation in
23 court.
24 Q So no?
25 A That's correct.

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1 MS. BROBST: I have nothing further on
2 qualifications and I will renew my objection.
3 THE COURT: Overruled. What you say certainly
4 has things to do with the weight because the gentleman has
5 never been into the bullpen. But at the same time, only the
6 weight. Not to the ability to express testimony.
7 MS. BROBST: Thank you, Your Honor.
8 DIRECT EXAMINATION (Continued.)
9 MR. VERRILLI:
10 Q Mr. Fisher, what did we ask you to do for Kevin
11 Wiggins in this case?
12 A First you gave me the transcript and portions of
13 the record in the case and asked me to review it and to render
14 an opinion as to whether I thought that counsel's performance
15 in the case was ineffective or effective.
16 Q Okay. In addition to reviewing the transcript
17 what else did you do to fulfill that task of rendering an
18 opinion on effectiveness of counsel?
19 A I went back and I reread all of the Maryland
20 ineffectiveness cases. I reread Strickland and a number of
21 cases that came from that. I talked with a number of
22 attorneys who had done capital litigation work and I also

23 spoke with some other attorneys who had -- some were not
24 currently, but who had prosecutorial background, to talk to
25 them about various aspects of this and whether or not they

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1 were of the same opinion that I was coming to. And that is
2 how I prepared.
3 I don't know if you recall this part of the
4 record, but I did read the trial judge's opinion.
5 THE COURT: You mean his opinion or that written
6 report that he is supposed to file?
7 THE WITNESS: His opinion on guilt/innocence,
8 Your Honor.
9 THE COURT: In other words from the transcript,
10 from what Judge Hinkel said from the bench?
11 THE WITNESS: Right.
12 THE COURT: All right, sir.
13 A Then of course in the last couple of days I have
14 been here and watched the testimony. In addition, I spoke to
15 you to try to find answers to some of the questions I had
16 about what had and had not gone on. I read the petition in
17 this case as well.
18 Q Did you hear all of the testimony of Carl
19 Schlaich yesterday?
20 A Yes, I did.
21 Q Did you hear all of the testimony of Michelle
22 Nethercott yesterday?
23 A Yes, I did.
24 Q I'm going to show you two documents which have
25 both been admitted into evidence. One is PC-2 and one is

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PC-4. Did you review these documents prior to the hearing today?
A Yes, I did. PC-4 is the jury composition report from Dr. Seltzer. PC-2 is the social history of Kevin Wiggins prepared by Hans Selvog.
Q Okay. Let's start with the issue of mitigation evidence. Mr. Fisher, are you familiar with the norms and standards expected of a reasonably competent defense counsel in preparation of a case in mitigation on the death penalty issue?
A Yes.
MS. BROBST: Objection.
THE COURT: Overruled.
Q Before explaining what the norms and standards are, can you summarize the basis of your knowledge of the norms and standards?
A Sure. It is very much what I was talking about earlier. I have had -- I guess really I have had five Maryland cases and I would say three or four other cases where I was actively involved in the representation of capital litigants. I have had a lot of other cases where although I wasn't counsel of record I was asked to consult on the case and have done so and have followed the cases through. They were not situations where I was just asked to talk about something for a brief period of time and then didn't know

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anything else about the case. It was ongoing consultation both in Maryland and in other states.
In addition, I have, as I have said, I have done research on capital punishment issues; I have attended

numerous seminars and participated in them; I have talked with mitigation specialists; I have done -- I know there are people who have done more, but I have done a lot of work in this area both substantitively and then just as a practical matter.
That is the basis of my opinion.
Q Okay. Generally in your opinion what are the minimum requirements for effective representation of a capital defendant at sentencing?
MS. BROBST: Objection.
THE COURT: Overruled.
A Uhm --
THE COURT: Let me ask you something. When you say you have an opinion and you based it upon all of these people you have talked to, is it accepted in your profession in expressing an opinion that you would rely on information of this sort?
THE WITNESS: Yes, it is, Your Honor.
THE COURT: All right. Go ahead.
Q Mr. Fisher, could you give us your opinion, your expert opinion on what the minimum requirements for effective representation in capital sentencing are?

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A I think you start at the beginning, which is you first have to go to the Statute and you have to look at whatever statute you are operating under, whether it is Maryland's or elsewhere, to see what the aggravators are and what the mitigators are that are statutorily prescribed. You start thinking about how you are going to try to either undercut the aggravators or to put on evidence in support of the statutory mitigating circumstances.
Then what you need to start doing is to do a complete comprehensive background on the client so that you

can not only address those issues but that you can also present additional evidence on what are commonly called non statutory mitigating evidence, things for example under the Maryland statute where the jury either individually or unanimously may be able to say we find the following information to the mitigating and would enter it into the weighing process.
That requires I think at a very minimum is you do a comprehensive psycho-social history of your client. You bring in somebody who is experienced at doing that and you have them do a comprehensive workup of the client. That means not just talking to the client but talking to family members, talking -- going back through all of their social files, juvenile files, criminal records, whatever other files may exist, subpoenaing those records, collecting them.

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You try to get everything you possibly can about the client's background to start examining that and developing that for a competent presentation at a sentencing hearing should you ever be there.
Q Okay. In your expert opinion is the use of an expert in the development of such material ordinarily a minimum requirement for effective representation in a capital sentencing proceeding?
MS. BROBST: Objection.
THE COURT: Overruled.
A Yes.
Q Can you explain why that is?
A It is kind of part and parcel of what I was saying earlier. In the normal criminal case if you are trying to put on sentencing information on behalf of your client. I think that criminal attorneys individually and maybe

institutions like a public defender, something like that, have a general approach to sentencing and they may go out and gather particular types of information. So maybe you do some investigation or something like that or you talk with your client, talk with the family and fine, you are able to develop a certain level of information.
In capital cases you have to go further than that and you have to be trained to do it. Most of the people that you encounter when you get into these very difficult issues

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such as abuse, neglect, sexual abuse, other sort of things, the client, the family, other individuals are very resistant to providing information, particularly at the outset. That needs to be developed. You have to have somebody who knows how to delve into that information, how to bring it out, how to look at records and so forth and understand what that means.
I as an attorney can look at a social file on a client. What I mean by social file is a file that might be created when he is a juvenile. I may see certain things. A person who has expertise in this area will look at it and see it at many different layers than I will. They will know how this information came about and they will know that there is more out there.
For me it will be a conclusion. For them it will be a clue. They will take that and go further. That is why you need to have these people who do that and that is what they do and they do it extremely well.
Q Mr. Fisher, have you -- let me withdrawal that.
Based on the knowledge that you bring to your testimony today, your review of the trial record and the testimony that you have heard thus far in these proceedings, have you formed an

opinion as to whether trial counsel for Mr. Wiggins met the minimum requirements of effective representation in a sentencing proceeding?

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A Yes, I have.
Q What is your opinion?
MS. BROBST: Objection.
THE COURT: Overruled.
A My opinion is that they did not both as an overall matter and in some very specific ways as well, that they did not meet the minimum standards of the profession.
Q Okay. I would like to elaborate on that. Tell us what you mean by that?
A I think overall it speaks for itself. I think had they done a variety of things that contributed to the result here, then they would not have been ineffective. In particular, the things that come to mind is first of all the whole question of their investigation, presentation of mitigation evidence. They simply did not do what is necessary in order to have presented that properly to the Court, to the jury on behalf of their client. I don't believe that -- we can talk about this in a moment, but this whole question about compelling the client, if that is indeed what happened, to choose a judge over a jury, I don't think is effective assistance of counsel. If it is a reasoned decision, that is a different matter. If it was something that was forced because of their inability to prepare and to get their own experts in line or to seek alternative means such as a continuance and so forth, then I

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believe it to be ineffective assistance. I believe that on the question of the impeachment of Dr. Korrell, which both counsel clearly believed she was a witness going through what they thought was the most important issue in this case, I think that their inability or their unwillingness to confront her with contradictory statements which were crucial contradictory statements is ineffective without justification. There doesn't seem to be a justification for their failure to do that. I don't think it shows any look at what the legal standards were by which they were to be guided on that question.
Q Let's go through each of those in detail. Let's focus on developing the case in mitigation. You stated that you thought that they did not meet the minimum requirements in developing that case. What did they fail to do that they should have done to meet the minimum requirements?
A I think they didn't investigate the matter adequately. That is to get somebody such as Dr. Selvog to come in and do the psycho-social history of the client and to delve into these various problems that he had. And then they didn't present -- I have read this report by Dr. Selvog. I must say that in terms of Mr. Wiggins's background, that the deprivations and neglect he suffered are -- they may not be the strongest I have ever seen, but it is among the strongest I have ever seen. I have seen dozens of background that have

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been comprehensively done. His is one of the more compelling. And that was never presented to the jury. It never got to them.
It certainly does not impress me as being any kind

of sound strategic decision to get there. There doesn't seem to be an excuse for them either not having gone out and put it together, because it was -- much of it was there for the taking. And then not presenting it just makes it, it just makes no sense to me, frankly.
Q Just so we are clear, is it your opinion that trial counsel failed to meet the minimum requirements of competent representation because they did not retain an expert to prepare what you have described as a psycho-social history?
A Yes, either to prepare an expert -- there are some public defender offices, I'm not saying that this one particularly has it, but other public defender offices may have somebody on staff who can do this properly. If you don't have that, you have to go out and get somebody who does it. They did not do it.
I'm not saying that in every single case you necessarily have to have a psychiatric social worker to do it if you have another means of doing it properly, but they clearly did not. They didn't do it and in this case their failure to do it is ineffective.
Q Is your opinion influenced by the fact that

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funds were available to hire an expert to do that?
A Certainly.
Q Is your opinion influenced by the fact that the Maryland Public Defender's office routinely hires experts to do these psycho-social histories?
A Yes.
Q Okay.
A Let me just say, it is also -- what is also particularly disturbing is in 1985, '86, '87 as the capital unit was developing, and as these conferences were being held,

this was something that was stressed at those conferences. This is what they were telling public defenders to do, that they needed to do the psycho-social history and to work it up. So it was a normative standard at the time that this case came in. Indeed, years beforehand. And again, it just -- I don't understand why that didn't happen.
Q Okay. And I take it that the kind of information you just described was imparted to the participants at the Saint Mary's conference?
A Absolutely.
Q Mr. Schlaich testified I believe that a forensic social worker did give a presentation at that conference which he attended. Was the presentation about the development of this sort of evidence?
A Yes.

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Q Now, do you have an opinion as to the likely impact of the failure to develop and present this evidence, principally the evidence contained in PC-2, the Selvog report?
MS. BROBST: Objection.
THE COURT: Well, he is just asking you yes or no.
THE WITNESS: The answer to that question is yes.
Q What is the basis for your opinion?
A Again, really -- well, I should say it is the same things that we talked about earlier in terms of experience. But what is particularly a part of that opinion is my own experience in the case that I did do where we went to a capital sentencing resentencing and some specific cases of which I'm aware either that I have worked on as a consultant or I spoke with the attorneys about.
When I talk about my own experience I'm talking

about the Mills case where in that case our client was someone who had a terrible prior criminal record of convictions for violent crimes; he had been serving a lengthy sentence for a murder when he committed a second murder while in a penal institution; he had some deprivations and some problems in his background but nothing nearly so severe as Mr. Wiggins.
And in that case when we went to sentencing verdict in front of the jury in Cumberland County they unanimously found for life. They unanimously found statutory

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and non-statutory mitigating circumstances of, again, of the nature that should have been presented in Mr. Wiggins's case but clearly could not have been presented so compellingly and they also found partially other mitigating circumstances.
Again, they found unanimously for life in a case which had once received a death sentence where that evidence had not been presented.
There is also other cases that I'm familiar with either, again, through consulting or being sort of working on in part with my partner, Mr. Morin. He recently had a case that was tried up in Harford County I think that was out of Baltimore County where there was a life sentence that was returned by a judge in that particular case. There are cases in Montgomery County, the Calhoun case comes to mind, again, where the background was -- the bad background was so much more severe than Mr. Wiggins had, the mitigating background was not nearly so strong and the jury is returning life sentences. There are also cases in Prince George's and other counties that I'm aware of.
So when I reach a decision about prejudice, that has impact on that decision.
Q Now, Mr. Fisher, based on all of the knowledge

that you bring to this case and experience and your review of the materials and testimony you have heard, testimony you just gave, what is your opinion as to the likely impact of the

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failure to develop and present this evidence?
MS. BROBST: Objection.
THE COURT: I will sustain that objection.
MR. VERRILLI: May I be heard on that?
THE COURT: Sure.
MR. VERRILLI: Yesterday counsel for the State specifically asked Carl Schlaich to compare his experience in this case with respect to the development and presentation of mitigating evidence.
THE COURT: Why didn't you object to that?
MR. VERRILLI: Excuse me?
THE COURT: Why didn't you object to that?
MR. VERRILLI: Because I thought it was reasonable grounds for her to go into and reasonable ground to develop it.
THE COURT: I don't agree with that. If you would have objected to it I would have sustained the objection.
MR. VERRILLI: Your Honor, we have to be able to present evidence here on the basis of experts' comparison of the facts and circumstances of this case as compared to the facts and circumstances of others.
THE COURT: Based upon what he has told me I'm not convinced that it is sufficient basis of comparison.
MR. VERRILLI: Your Honor, I would have to note

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for the record that if we are not allowed to develop this evidence of prejudice --
THE COURT: I'm not going to allow you to develop it. You can proffer for appellate court purposes whatever you want to but I will not consider this as evidence in the record.
MR. VERRILLI: Let me note for the record an objection on the ground that we think the failure to allow the introduction of this evidence will deprive us of the ability to have a full and fair hearing on this question --
THE COURT: Fine.
MR. VERRILLI: -- to the extent it is a factual question, which we believe it is.
THE COURT: I can only say in my experience of sixteen years on the bench if this fellow was allowed to express the opinion on the meager little evidence that he has presented to us as far as comparison is concerned, then anyone should be able to express an opinion on almost anything. With that, I'm in the business of reading juries and judges and knowing. He certainly does not have an adequate basis to express that opinion. I will allow you to proffer it for appellate court purposes but will not consider it as evidence in the case. Objection overruled.
MR. VERRILLI: In terms of proffer, Your Honor, I would prefer that we have Mr. Fisher say what he would say.

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THE COURT: I will consider what he is going to say, now, sir, as a proffer and for the benefit of 361 Rowe Boulevard but not having to do with evidence in the case.
Q Very well. Mr. Fisher --

THE COURT: Let me say this to you. I know that death is different. That is preached to us. That is said to us. But it isn't that different that he should be able to express this opinion in my humble opinion.
All right. Tell me what he will say.
Q Mr. Fisher, what is your opinion as to the likely impact of the failure to develop and present such evidence?
A I think that there is and, in using the standards of Strickland, more than a substantial probability that this failure to present evidence effected the outcome of the sentencing hearing in this case.
Q And why is that?
A Because -- what I have said just a moment ago I think in many ways is the primary thing. That is I have seen this, what happens when you present mitigating evidence of this nature, particularly when there is not an overwhelming number of aggravators or aggravating evidence that is presented by the State.
In addition, if you look at the -- the jury received some spares background on Mr. Wiggins and there was

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no argument about it; there was no presentation through individual witnesses. And yet from that alone, at least some of them on the verdict form indicated a willingness to find a mitigating circumstance.
Q Was that a mitigating circumstance of background?
A That's right. And without any request to further define that or break that out or to make individual aspects of his background individually mitigating, which when I talked about the Mills case before, that is what was done

11 and the jury both in terms of how we questioned them at the
12 beginning and when we talked to them afterwards talked to us
13 about why it is so important to present them with mitigating
14 evidence of that nature about a person's background.
15 Again, I have done a lot of reading on this
16 particular issue about what juries are concerned about as far
17 as mitigating evidence. The things that are in Kevin
18 Wiggins's background, the neglect, the abuse, really basically
19 the abandonment as a child and then when he finally gets into
20 some stabilized situation exacerbation through abuse is
21 extremely strong mitigating evidence.
22 In my opinion had that been presented, that the
23 outcome of this sentencing would have been different.
24 MR. VERRILLI: Thank you. That concludes our
25 proffer. I propose now to return to the presentation of

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1 evidence.
2 THE COURT: All right. Proffer is over. We will
3 take a break for lunch. Come back at 1:30 and we will listen
4 to you then.
5 Sir, remember that when you are in the middle of
6 your testimony you are not able to talk to anyone about your
7 testimony and that includes the attorneys in the case.
8 THE WITNESS: Certainly, Your Honor.
9 (WHEREUPON, the court recessed and reconvened.)
10 THE COURT: Come back to the stand, Mr. Fisher.
11 What are we going to do about arguing the case?
12 MR. VERRILLI : We would favor prompt argument.
13 THE COURT: How about next week?
14 MR. VERRILLI: That would be fine. We are
15 informed that a transcript can be ready by the end of this
16 week, as long as we have a couple of days to read it, digest

17 it and pull out the evidence.
18 THE COURT: Yeah. Find out what days next week
19 would be okay for Justice Grimm. Have you got any trials?
20 MS. BROBST: I would have to call my office. I
21 don't carry a pocket calendar. I can handle that during a
22 recess.
23 MR. VERRILLI: Your Honor, my only unavailability
24 next week is Tuesday.
25 THE COURT: Tell her Tuesday is bad.

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1 You had some more questions to ask the gentleman?
2 MR. VERRILLI: Yes, I do, Your Honor.
3 DIRECT EXAMINATION (Continued.)
4 MR. VERRILLI :
5 Q Before lunch we were discussing the issue of
6 preparing the case in mitigation in a death penalty case.
7 Let's just recap the opinions you rendered before lunch so we
8 have them clear. Now, as I understand it is your opinion that
9 the failure of defense counsel in this case to develop and
10 prepare a psycho-social history on the order of exhibit PC-2,
11 the Selvog report, fell below the minimum requirements for
12 effective representation in a capital case, is that right?
13 MS. BROBST: Objection.
14 THE COURT: Overruled.
15 A Yes.
16 Q That is a fair recap of your testimony?
17 A Yes.
18 Q Now, is one reason for that opinion that
19 attorneys in capital cases need to know how strong their case
20 in mitigation is before deciding how to handle the sentencing
21 proceeding?
22 MS. BROBST: Objection. Leading.

23 THE COURT: Well, that is what he said.
24 Overruled. That is a compilation.
25 A Yes. That is true.

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1 Q Now, does that need to know how strong a case in
2 mitigation is vary from jurisdiction to jurisdiction?
3 A No.
4 Q So is it fair to say that is a uniform
5 requirement for any defense counsel in any capital case in any
6 jurisdiction in this country?
7 MS. BROBST: Objection.
8 THE COURT: Overruled.
9 A Yes, that is my opinion.
10 Q In terms of the presentation of a psycho-social
11 history at a sentencing proceeding is it critical whether the
12 expert social worker is competent to deliver a medical
13 diagnosis?
14 A It doesn't necessarily have to deliver a medical
15 diagnosis. It represents that the person have some knowledge
16 of medical matters because, again, as you begin to develop
17 this information things will come up in the background,
18 whether they be through discussion with the witnesses or the
19 client or a review of the files that will be in some sort of
20 medical terminology or bring forth medical questions. And
21 they need to know how to follow-up on that. So that knowledge
22 is important.
23 Q Medical knowledge is important?
24 A Right. But they don't need to be a physician,
25 you don't have to be a psychiatrist in order to be a

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1 psychiatric social worker. But you have to have some
2 specialization in the development of this information.
3 Q Right. Now, in terms of the presentation of the
4 information at sentencing, is the information of the kind
5 contained in PC-2, the Selvog report, relevant mitigating
6 evidence based on your understanding of everything under the
7 law, whether or not it comes in the form of a medical
8 diagnosis?
9 A Absolutely.
10 MS. BROBST: Objection.
11 THE COURT: I'm going to overrule the objection
12 because I don't believe that anybody would testify in the
13 world that had any familiarity with this case as to anything
14 other than what this man is testifying to. It is not even
15 expert opinion. It is God given fact. Go ahead.
16 A I guess my answer is yes for the record.
17 Q Okay. I'd like now to stay with the mitigation
18 question and change the focus a little bit and talk with you
19 about trial counsel's, Mr. Schlaich's, decision to retry the
20 guilt/innocence issues at the sentencing phase of the
21 proceeding.
22 Do you have an opinion as to whether or not that
23 course of conduct by Mr. Schlaich fell below the minimum
24 requirements of capital counsel in a sentencing proceeding?
25 A Yes.

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1 THE COURT: What part of his -- what did he do?
2 What fell below?
3 MR. VERRILLI: The decision to retry guilt and
4 innocence at the sentencing phase of the proceeding.

5 THE COURT: Okay.
6 MR. VERRILLI: To the exclusion of all other
7 avenues of mitigation.
8 THE COURT: All right.
9 A What I was going to answer is yes and
10 particularly because of the --
11 MS. BROBST: Objection.
12 THE COURT: Okay.
13 MS. BROBST: He was asked a yes or no question.
14 THE COURT: Remember now, the question is his
15 decision to try the guilt/innocence, the reasonable doubt
16 aspect of it twice to the exclusion; do you understand that?
17 There is nothing wrong with his decision in your opinion, is
18 it, with trying to put the guilty conscience on the trial
19 judge or the jury; hey, there is doubt about this; even though
20 you convicted him, don't kill him?
21 THE WITNESS: No.
22 MR. VERRILLI: Is that directed at the witness?
23 THE WITNESS: Your Honor, I don't think there is
24 any problem with the decision to retry guilt/innocence as part
25 of an overall mitigation case.

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1 THE COURT: That is part of the game. You have
2 made your decision guilt/innocence but if there is a thousand
3 in one chance, then don't kill him?
4 THE WITNESS: Right.
5 THE COURT: That is part of the game.
6 THE WITNESS: Certainly.
7 THE COURT: You are saying to the exclusion of
8 everything else?
9 THE WITNESS: That's correct.
10 Q Okay. Why do you hold that opinion?

11 A In sort of summary fashion, again, I think it
12 has to do both with my experience, the experience of other
13 attorneys, and just simply looking at this, there was and
14 there is strong mitigating evidence on behalf of Kevin Wiggins
15 that has been developed by Dr. Selvog concerning his
16 background and things that have to do with him.
17 There is no inconsistency in being able to try the
18 guilt/innocence, reasonable doubt or lingering doubt or
19 however he might have wanted to phrase it to the jury while at
20 the same time presenting this evidence. And in addition, as I
21 said before, this is not weak mitigating evidence on behalf of
22 Kevin Wiggins. It is very strong mitigating evidence. And to
23 decide to forego that entirely or in any coherent competent
24 form simply to pursue the reasonable doubt question
25 particularly when -- I mean, this is the only case I know of

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1 where the sequence was there was a Judge trial and you tried
2 guilt/innocence and then you are asking a jury to override a
3 judge's decision in essence about the quality of the evidence.
4 I know of other cases where you are either tried
5 guilt/innocence to a jury and then you tried the question of
6 the quantum of the evidence again to them at sentencing in
7 addition to presenting other mitigation evidence. But I don't
8 know of any cases where you tried to get them to override the
9 judge's decision and then presented them nothing else.
10 Q Is that in your opinion -- let me ask it this
11 way. Can you elaborate on the significance of the testimony
12 you just gave why it is significant that there was a change
13 from the judge with respect to guilt and innocence and then
14 the jury with respect to sentence?
15 A What you normally are hoping to do when you
16 present lingering doubt or reasonable doubt at the sentencing

17 is when you have what you consider to be a weak factual case
18 and yet guilt has been returned, you particularly when that
19 has been after a long deliberative process by the jury, where
20 they didn't return a quick verdict, where they took some time
21 and there seemed to be some agonizing in the jury room, what
22 you are intending to do is reach those one or two or maybe
23 more jurors who had some very grave concerns about the
24 client's guilt and to make that be a mitigating factor. And
25 so you are going for the same people who you had been dealing

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1 with on guilt or innocence.
2 But when you have a judge who you tried the
3 guilt/innocence to a judge and the judge has found the
4 evidence, and that has some -- a judge's decision has some
5 power, it has some sway over a jury, and then asking a jury to
6 override that in essence and find that the judge's
7 determination was in error, I just think that that is flawed
8 -- that sort of thinking is flawed from the outset.
9 If it is the only thing you have got, fine, you
10 may have to do that. But that wasn't the only thing that
11 existed here. There was so much more to present on Kevin
12 Wiggins's behalf in mitigation that wasn't developed and
13 wasn't presented and I think that that -- it just doesn't rise
14 to the level of sound decision making by competent counsel.
15 Q What about the hypothetical risk that was
16 discussed yesterday of opening the door to potentially
17 unfavorable information?
18 A You mean with regard to the mitigation?
19 Q Right.
20 A First of all you have to develop it and you have
21 to work on how you are going to present it to even make that
22 determination. You can't -- saying that you are not going to

23 present psycho-social background information because there is
24 a risk that it can be dealt with effectively in
25 cross-examination is somewhat akin to saying on a

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1 guilt/innocence trial I never present self defense claims; I
2 never present alibi claims; I never do those sort of defenses
3 because there is problems with them.
4 Every defense has problems but you have to go out
5 and investigate it, develop it, decide on the presentation and
6 then weigh what is going to go on with that presentation in
7 determining whether to use it or not to use it. So as a kind
8 of preliminary step that wasn't done.
9 Then in addition, again, I just go back to the
10 quality of this evidence. It is extremely compelling
11 mitigating evidence. I think even had he done the background
12 as he should have, when he looked at this evidence it is not a
13 sound decision not to present it. And, indeed, a glimmer of
14 it got to the jury in some form, either the presentence report
15 or something that they picked up because it was in there a
16 little bit but not developed in any way.
17 So the notion that there was a tactic in not
18 presenting it makes no sense because it was at least there in
19 the evidence a little bit but not presented in any coherent
20 fashion.
21 Q And I take it that you heard Mr. Schlaich
22 testify yesterday that whatever mitigating evidence he had
23 developed he gave to the person preparing the presentence
24 report; do you recall that?
25 A Right.

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Q What significance does that have in your overall assessment of the reasonableness of his conduct?
A Again, if -- the presentence -- I read the presentence report in this case and there is two paragraphs about Kevin Wiggins's background that just touch upon the problems that he had and nothing more. There is no independent investigation, any kind of workup.
If the tactical decision by Mr. Schlaich was not to present this evidence, obviously that is contrary to it because he got it to the presentence report writer in some fashion. But if he had it, at least he had the beginnings of it and he had no resources impediment to doing a further investigation, then he could have and should have gone out and developed it.
This notion that there was a downside, it just doesn't make a lot of sense because he ultimately presents it in some way, at least in very, very limited way. He should have presented it more fully. He should have developed it.
Q So just to recap now, is it your testimony that Mr. Schlaich's decision just makes no sense given that he in some perfunctory way sought to get that mitigation evidence to the jury?
A Yes. There is one other part of it that was just troubling to me because I don't quite understand from the record. When you look in the record at the time that the

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verdict was returned by the judge, the guilt/innocence determination, there was a request for additional time to develop mitigating evidence at sentencing and a specific request. They said we are not prepared, we need to go out and

develop mitigation, we need to go out and develop some statistical information. There is some reference to it by him. Something was envisioned at that time or some notion of presentation and at least from what I see there doesn't appear to be anything done about mitigation during that time period. Again, it was thought about at some level but not followed up at any level.
Q Okay. Have you got a copy of the Maryland capital punishment statute in front of you?
A Yes.
Q I'd like to ask you a couple of questions about it. We are talking now about Section 4-13, subsection G?
A Okay.
Q These are the mitigating circumstances enumerated in the statute. Is it your opinion that it is part of trial counsel's job to review these statutory mitigating factors?
A Yes.
Q And is it your opinion that it is part of trial counsel's job to develop available mitigating evidence as indicated by the mitigating factors in the statute?

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A Yes.
Q Can you take a minute and review the mitigating factors in subsection G and identify for me the potential mitigating factors listed in the statute that you believe are relevant here and that Dr. Selvog's report would have been relevant to?
MS. BROBST: Objection.
THE COURT: Overruled.
A Certainly. First of all, in this -- and this may be somewhat independent of the question, but the very

first mitigating factor, the absence of a prior history of criminal record of violence, in what I understand about Mr. Wiggins's background, what existed, I know there is some reference to it in the trial and sentencing proceedings; it is not entirely clear to me whether that was part of the verdict form, although I think it was. It is not clear. That certainly is one that pertained in this case.
But with regard more particularly to Dr. Selvog's report, if you go to Number 4, which is the murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance, his report clearly goes to that. There are a number of things in there that independently and collectively

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I think go to that issue and certainly might have persuaded a jury to unanimously or less than unanimously --
MS. BROBST: Objection as to what it would have persuaded a jury to do.
THE COURT: He is just commenting on factors and to say may means nothing. Overruled.
A That may have had a jury return it on that particular one. The question number 7, which is it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society, again, I think the information in Dr. Selvog's report goes to that issue.
And then, as we talked about earlier, really, number 8, which is any other facts which the jury or the Court specifically sets forth in writing that it finds as mitigating circumstances in this case, and you could either have there

might either be a generic term such as background of Kevin Wiggins or something like that. Or more specifically you could break that down into any specific mitigating factors, that he was abandoned or neglected as a child, that he was sexually abused, that there was other abuse in his background, his mental health and his IQ, all of those things could be for a jury independent, non-statutory mitigating factors under item 8 here.
Q Mr. Fisher, I am prepared now to move to another

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topic. Before I do I want to ask you whether there is anything that you feel you have left out in terms of the opinion that you have rendered with respect to the mitigation phase of the case that you would like to add at this time?
A Not that I can think of.
Q Okay. Let's turn now to the jury composition challenge question.
A All right.
Q Do you have an opinion, Mr. Fisher --
THE COURT: Wait a minute. Is this the racial aspect of it?
MR. VERRILLI: Yes, Your Honor.
THE COURT: All right.

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CROSS EXAMINATION [WITNESS: GERALD FISHER]
MS. BROBST:
Q Thank you, Your Honor. On how many occasions have you been asked by post conviction counsel to review a death penalty case and testify as an expert witness?

17 A I have been asked to testify as an expert
18 probably about a dozen times. In all of those save this one I
19 have for various reasons not done so. Sometimes it has just
20 been scheduling concerns. Other times it has been other more
21 personal concerns. So I haven't done that.
22 If I can sort of break your question down. I have
23 reviewed a number of cases, records or at least petitions in
24 the beginnings of records either for that purpose or for other
25 purposes, and that is probably, I don't know, maybe more than

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1 a dozen times that I have looked at petitions and records and
2 we have talked about ineffectiveness questions but never been
3 directly asked do you want to be or would you be available to
4 be an expert in capital case for ineffectiveness purposes.
5 Q So this is the first time?
6 A This is the first in a capital case, yes.
7 Q And how many post conviction petitions have you
8 filed in capital cases?
9 A In capital cases?
10 Q Yes.
11 A Probably -- I don't have an exact number. It is
12 in the nature of seven or eight post conviction cases that I
13 have worked on.
14 Q Have you ever filed a petition for post
15 conviction relief and failed to allege incompetency of
16 counsel?
17 A Yes.
18 Q What case was that?
19 A It was a case in Georgia. I think it is the
20 Cape case, State versus Cape.
21 THE COURT: I bet you there is some judges down
22 there that have more than four death penalty cases they have

23 tried.
24 THE WITNESS: Clearly. There was actually very
25 good trial counsel in the case but there were a number of very

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1 substantial issues that at one level won relief and ultimately
2 that was overturned by the 11th Circuit I believe.
3 Q So in six out of seven petitions for post
4 conviction you have filed you have alleged incompetency of
5 counsel?
6 A Yes.
7 Q And alleged that it was first incompetent and
8 second that it prejudiced the outcome, is that correct?
9 A Some of these were pre Strickland cases, so I
10 don't know if we made the claim in quite the same -- at the
11 time in 1983 and 1984 and before Strickland in '85 there were
12 different standards of incompetent counsel depending on where
13 you were litigating. The circuits were divided, the states
14 were divided on the standards.
15 That is essentially what the standard did, is it
16 coalesced it into one standard. For all practical purposes
17 that is what was being done. You are alleging that counsel
18 was functioning incompetently and that there was prejudice,
19 but the prong was much different back then.
20 Q All right. When were you contacted to act as an
21 expert in this case?
22 A I can't remember the exact date. It probably
23 has been about, I don't know, maybe ninety days ago, about
24 thereabouts, two, three months ago.
25 Q When were you able to conclude as a fact that

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counsel had been in fact incompetent?
A Once I had gotten the record, talked to some people about the allegations that were being made -- I can't give you an exact date but probably -- it took me awhile to get through the transcripts and everything. So probably about thirty to forty-five days ago, maybe a little bit longer than that.
Q You repeatedly refer to the basis of your opinion stating in addition to the materials that you reviewed and this vast knowledge that you have in this area, that you also consulted with other attorneys who you considered to be versed in capital litigation?
A Yes.
Q Can you estimate for us to what extent the opinions you stated today are yours as opposed to theirs?
A My opinions are hundred percent my opinions. They are based in part on other people's independent view of the questions, I mean, in the sense that we talked about them, and I tried to see if there were things that their conclusions were different than mine. If someone on a particular issue had said no, I think there is a legitimate reason for doing something, that this makes sense, it might have swayed my opinion otherwise. Quite frankly, I didn't get that response from the people I talked to.
I think my opinions are almost one hundred percent

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the same opinion shared by the other people.
Q So your opinions are bolstered by all these other unnamed people?
A You can use that word. They are certainly

seconded and thirded by them.
Q You repeatedly referred to the writer of the background information in the Wiggins background history as Dr. Selvog. Isn't it true that in fact he is Mr. Selvog and is a licensed clinical social worker?
A I thought he had a PhD and that is the reason I referred to him as Dr. Selvog. If I'm wrong about the PhD label, then I'm wrong. I didn't mean to suggest that he was a medical doctor. I thought he had a doctorate. I may be wrong about that.
Q Now, how many people are on death row in the State of Maryland?
A What is the number now? I don't know the exact number. I think it is in the 20s.
Q How many of them introduced mitigating circumstance about his background at his sentencing hearing?
A I don't know what the number is on everyone -- the majority have done so. A number of them did not do so. I can't say I have broken it down numerically. There are a number who are on death row who did not present mitigating evidence and there are a number on death row who did present

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mitigating evidence. The vast majority are in the latter category.
Q In other words, most of them did present this kind of background information on mitigating circumstances?
A Do you mean the fully developed psycho-social history?
Q That is what I mean.
A I'm not sure I would say the majority had done that. I think --
MR. VERRILLI: Your Honor, could I be heard for a

11 moment?
12 THE COURT: Yes.
13 MR. VERRILLI: Seems to me Ms. Brobst is asking
14 questions in precisely the area that Your Honor forbade me
15 from going into, comparison of what happened in one case with
16 psycho-social histories as opposed to what happens in other
17 cases that didn't have them.
18 THE COURT: I would not accept that if that is
19 the reason she is doing it. Frankly, I thought that it was
20 another reason. I thought that she is asking these questions
21 to show that he has not done his homework as extensively as he
22 says he has because he really hasn't gone to the one source
23 that people would go to first, namely the people that are on
24 death row.

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[THE COURT]
14 The question is there are twenty people on death
15 row. Did any of their lawyers do it? She has a right to ask
16 that question.
17 MR. VERRILLI: I don't dispute that. I want to
18 make clear that I think I'm going to have a right then to
19 explore the same question of comparison.
20 THE COURT: Maybe as comparison as to whether they
21 did it. But as to what they did, it is an entirely different
22 thing, sir.
23 Let's listen to the questions.
24 Q I know that you were present during the
25 testimony of Mr. Schlaich and Miss Nethercott, so these

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1 questions are along the same lines that I asked them. You are

2 aware of strategic problems with introducing a defendant's
3 background through clinical types, are you not?
4 A Strategic problems can arise. I can't say that
5 in every case they do arise. There are concerns in every case
6 about what is going to happen in terms of other evidence
7 presented by the State or cross-examination by the State.
8 Q Okay. Specifically regarding, for want of a
9 better term, bad things the defendant has done earlier in his
10 life that would not otherwise be admissible specifically in
11 the merits in this case or on sentencing, is that correct?
12 A Yes.
13 Q You run the risk of opening the door on a lot of
14 stuff, is that right?
15 A You run the risk of opening the door to whatever
16 exists for the particular defendant.
17 Q Okay. And you are aware, I'm sure, of problems
18 of credibility that a defense attorney could face when
19 addressing a jury with what I will call conflicting defenses
20 and I will give you an example; he didn't do it but if he did,
21 it is because he had a lousy background?
22 A That problem in general exists. What I stated
23 earlier though I think is true. First of all, I don't think
24 there is a conflict in the situation of putting up reasonable
25 or lingering doubt and putting up mitigating evidence about an

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1 individual. I don't think that creates a conflict.
2 Certainly in all the cases I know about where the
3 lingering doubt or reasonable doubt issue has been raised, it
4 has been raised in tandem with other mitigating evidence. And
5 jurors in post decision interviews do not seem to be disturbed
6 about that presentation. And in a number of cases of which
7 I'm aware there has been verdicts and findings -- verdicts for

life and findings of mitigating evidence either accepting or rejecting the lingering doubt question.
So I just don't see it as a conflict here.
Q As you know, the defendant -- the State stipulated to the mitigating circumstance Number 1 in this case?
A Yes.
Q The defendant had no prior criminal record?
A Yes.
Q What age was he when this crime occurred?
A He was in his late 20's, I think.
Q Don't you agree that there is a substantial probability that background information such as that contained in the Selvog report would have given the jury an answer to the reason why someone might have done a thing like this, which they wouldn't have had otherwise?
A I really don't see it as that. It is not the type of crime -- if this had been a crime where there was some

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earlier conduct of his or some earlier problems of his that seemed to have been very directly connected to the conduct here, and I'm not trying to undermine -- this was a murder and I know it was of an elderly victim, but there was not -- there wasn't like wild, crazy bludgeoning; there wasn't wild sexual conduct or anything like that. These things weren't established by the evidence in this case. So I don't see the connection here.
There are cases I think where that is a dilemma, that you worry it would give some sort of explanation. I still believe you need to be able to present mitigating evidence. How you present it may be somewhat different. But I don't think it existed here.

Q How was Mrs. Lacs killed?
A Well, apparently by drowning in -- a combination of drowning and strangulation and she had a heart attack at the time. So it does seem that there was some combination of factors going on at the same time.
Q And her underpants were removed?
A She was not wearing underpants.
Q Her skirt was pulled up around her waist?
A Yes.
Q And Black Flag and Top Job had been dumped on her.
MR. VERRILLI: Was that a question?

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Q Isn't that correct?
A From the evidence in this case, yes.
Q And don't you think a jury would want an explanation for how could somebody do a thing like this?
A They might want an explanation. I don't doubt that.
Q And if the State was stuck with merely a 26 year old individual with no prior criminal record, they wouldn't have that explanation, would they?
A Conceivably they wouldn't have that explanation. I don't think by the presentation of the mitigating evidence they would have had that explanation.
MS. BROBST: Okay. Would you mark these, please?
(WHEREUPON, the above referred to documents were marked for Identification as State's Exhibit Numbers 2 and 3.)
Q How do you know that the trial attorneys did no background information or checking on behalf of the defendant Mr. Wiggins?

20 A I don't think I said that they did none. I
21 think what I have said is that they haven't done a
22 psycho-social history with him. They haven't done an
23 extensive background check at least from what I have seen of
24 the record in this case.
25 Q Okay. And you had an opportunity to review the

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1 record in this case, is that correct?
2 A Yes.
3 Q I'd like to show you what has been marked as
4 State's Exhibit Number 2 and 3. This has been marked as
5 State's Exhibit Number 2 for post conviction hearing. I ask
6 you if you have had an opportunity to review that document
7 before?
8 A Um-hum.
9 Q Okay. What does that document indicate?
10 A It is a defendant's supplemental answer to the
11 State's discovery request. It indicates that the defense had
12 intended to call a William -- I don't know how you pronounce
13 it. S T E J S K A L. An expert in psychology. And went to
14 the question of whether he suffered from a mental disorder,
15 and then also some testing that the doctor had done.
16 Q It described some testing that the doctor had
17 done?
18 A That's correct.
19 MS. BROBST: I move this in evidence as State's
20 2.
21 MR. VERRILLI: I assume this is part of the
22 record already. I Have no objection.
23.THE COURT: Let me see it, please. Overruled.
24 Put it in.
25 (WHEREUPON, the above referred to document was

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1 entered in evidence as State's Exhibit
2 Number 2.).
3 Q I will now show you that which has been marked
4 for the purposes of the post conviction hearing only as
5 State's Exhibit Number 3. I ask you whether you have had an
6 opportunity to review this document?
7 A Yes.
8 Q What is that?
9 A This is a defense motion to produce tangible
10 evidence before trial which in part seeks to, if I can read it
11 for one moment -- I think what it does is it is asking to be
12 able to look at certain records that pertain to his background
13 in order to prepare for court proceedings, for trial
14 proceedings and sentencing.
15 Q Okay. And do you know whether an order was
16 signed pursuant to that motion?
17 A I believe it was.
18 Q Do you know whether or not those documents and
19 materials were released to defense counsel?
20 A I don't know if all of the documents requested
21 here were. I know that there are records in the -- there are
22 documents in the record about his social history and his
23 social background.
24 Q In what record, in the record of the Court file
25 or the record of the Public Defender's office?

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1 A Things I have reviewed. I can't tell you
2 whether they were formally placed in the Court's records. I
3 assume they were because they were subject to court order.
4 But they were given to me to review. I just assumed that they

were part of the Court record but I don't know one hundred percent as opposed to belonging to the defense counsel at some point in this thing.
MS. BROBST: I would move this in evidence as State's 3.
(WHEREUPON, the above referred to document was entered in evidence as State's Exhibit Number 3.)
Q Are you aware that there was a hearing in fact on whether these documents could be released because of certain privileges?
A Yes.
Q Okay. And the defense argued for their release against the attorney from Baltimore City for the Department of Social Services, is that correct?
A Yes.
Q Now, you are aware also that the defense in this case filed a motion for bifurcation of the issues in the sentencing hearing, are you not?
A Yes.
Q And in that motion they requested that the issue

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of principalship be tried separately from the issue of mitigation?
A That's correct.
Q And was that motion granted or denied?
A Denied.
Q At the time the Wiggins case was tried in 1989 was the issue of whether a sentencing hearing could be bifurcated fully determined by the Court of Appeals yet?
A Not fully determined, but certainly their indication was on this question of principalship it wasn't

going to be.
Q In fact in what case was it finally determined?
A I cannot remember the name of the case. I'm sorry. I know has been finally determined that it is a unitary issue at this time.
Q Do you know what year that occurred?
A I think 1992 if I'm correct. I'm not one hundred percent sure.
Q That was the first time the Court of Appeals actually came right out and said that a judge doesn't have the discretion to bifurcate the issues in the sentencing hearing, is that correct?
A Correct.
Q So did you have an opportunity to read Mr. Schlaich's proffer of evidence at the sentencing hearing after

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they made their pitch on principalship?

* * * *

A Yes.

* * * *

[BY MS. BROBST:]
Q You know that there were or there was a case in Baltimore County tried this same year in which the trial court had granted bifurcation of the principalship issue from the other mitigating circumstances?
A I believe it was -- if you tell me it is

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Baltimore County I would say yes. I can't say that I know that with certainty. I knew about a case at the same time. I

wasn't hundred percent sure that it came out of Baltimore County.
Q Could it have been Gregory Jones in front of Judge Sfekas?
A I'm not sure that anybody provided me the name of the case. It was something discussed at one of these occasions with capital counsel.
Q You would agree that it was somewhat in vogue at that time to request bifurcation?
A I'm not sure if I recall it that way. It was an issue that was addressed by defense counsel.
Q And Mr. Schlaich argued after, as I said, he made his pitch on principalship, that he couldn't introduce this mitigating circumstance that he had developed through DSS and through this psychologist because he felt that that would have a spill-over effect on the principal issue, did he not?
A I would have to look back in the record. I can't remember his exact words. That sounds like what I recall. If you are referring to the argument that he is making at the bottom of Page 114, the first page that you showed me here -- I think I just need to make something clear in terms of what I'm saying. I think there is a big difference between psychiatric or psychological evidence in

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the sense of testing or a psychiatrist to talk about mental state than there is in doing a psycho-social history. What at least I see Mr. Schlaich here saying is that he was concerned about the potential prejudice if he were to put on Dr. Stejskal or however he pronounces it, and the psychological evidence. I think that is different. It is different than what I'm talking about, about the development of a psycho-social background which is a more historical

matter as opposed to testing and questions of legal questions about certain issues.
Q Such as those materials that would be contained in the DSS reports from Baltimore City?
A Well, that is information but it is not put into a coherent whole in any way. I think one of the things that Dr. Selvog does is he takes that information and follows it up in terms of talking with family members, in talking with Mr. Wiggins, and doing other things and brings out further information about the details of what was going on and then shows how that entered into the overall background picture of Mr. Wiggins. That is not what testing is. That is not what psychiatric work is. When we talk about developing mitigation, you talk about looking into psychiatric issues, you talk about doing psychological testing. Those are different things than what Dr. Selvog or Mr. Selvog, whatever his formal title is, and

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what NCIA does. That is different.
Q Okay. You testified on direct examination, and correct me if I'm wrong, that you felt it was a tactical error, an incompetency of counsel to merely rehash the lingering doubt or the reasonable doubt element and not present other evidence of mitigating circumstances?
A I don't know if I used -- I can't remember the exact word. It is a decision that I considered not to be competent for two reasons: Because there is not an exclusivity between the two things; they are not mutually exclusive; and they hadn't done the workup. Even if they made that decision as a tactical decision, they hadn't done the workup to make the sound tactical decision. You can't make your decisions in a vacumn. At least from what I see that

wasn't done.
Q But they were prepared, you will agree from the transcript, to introduce psychological and DSS records in mitigation had their motion to bifurcate been granted?
A According to this statement, yes.
Q According to what Mr. Schlaich says on the record in the transcript?
A Yes.
Q And to that extent there was a tactical reason, whether you agree it was a good one or not, it was a plan; it was something they had thought about and considered, is that

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correct?
MR. VERRILLI: Objection.
THE COURT: Overruled.
A Quite frankly I don't know how much they thought about it or whatever. I know that -- as it is phrased here, it was informing the Court that they could not determine that they could present this psychological evidence and the DSS evidence if bifurcation were not granted.
Q And in fact the way the argument went, he was also trying to make a ground for appeal, wasn't he? In other words, saying you forced my hand; by failing to grant my motion to bifurcate, you, Judge, have prohibited me from introducing this?
A I can't tell you -- again, I haven't heard Mr. Schlaich testify about what else he was doing or whatever. He made the statements. They stand in the record. Whether he was trying to create an issue for appeal I really don't know.
Q Okay. Wouldn't that be a reasonable thing to conclude from the way the record reads?
MR. VERRILLI: Objection, Your Honor.

MS. BROBST: He has testified he is an expert.
THE COURT: You are asking as far as reasonable is concerned. I think I will sustain that objection.
Q You also stated -- actually counsel for Petitioner stated that this was done to the exclusion, this

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relitigation of reasonable or lingering doubt, done to the exclusion of all other mitigating evidence; in fact that is not entirely accurate, is it?
A The only things that were done in terms of mitigation that I saw was those references in the presentence report and I believe they presented Dr. Johnson from American University to talk generally about adjustment of individuals who are serving life sentences in prison. I'm trying to remember. I just have to look at my own notes. I think that was pretty much the sum and substance of the mitigating evidence that was presented. That was the additional things that were done.
Q This is with respect to the impact on the jury of the instruction that the defendant has already been convicted and that decision is binding on you. Isn't it true that in Maryland in fact the jury has to go on to make an additional decision not merely is one guilty of first degree murder, but whether one is a principal in the first degree?
A Yes.
Q So to that extent the State bears a greater burden, is that correct?
A It is an additional burden. Sometimes it is the same burden as proving guilt, depending upon what the facts in the case are. If you have facts that basically go towards one person did the crime and the defendant has been convicted of

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the crime, then principalship although in law it is an additional decision, is I think pretty much a foregone conclusion.
When you have situations when there are a number of people who are acting in concert and one is the triggerman and the others are not, then I think it is a much more difficult issue and a much greater burden for the State.
I don't think that is operating here. I think this was pretty much a case where the conclusion was that one person did this and that person was the person who was convicted of doing that. No one else was charged ultimately. I know the lady who testified yesterday was initially charged but ultimately charges were dismissed.
So I think principalship was pretty much guilt/innocence in this case.
Q Obviously you did not see Dr. Korrell testify?
A No.
Q Have you ever seen Dr. Korrell testify?
A No.
Q Is it your expert opinion that it is never better to leave a witness alone? In other words there is never an occasion where no cross-examination is appropriate?
A No, that is not my opinion.
Q Isn't it true where there can be occasions where a witness was so unhelpful to the proponent of that witness,

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that it would be incompetent to cross examine that witness?
A There are times when that is true.
Q In fact on those occasions cross can be counter productive, is that correct?

A Potentially, yes.
Q And obviously you weren't present during the discussions on whether the defendant, petitioner in this case, should proceed court or jury on guilt/innocence?
A No.
Q And have no direct knowledge of what occurred?
A No.
Q Okay. Now, you have opined in this case with respect to whether the state had a greater or different burden on principal first than just to prove guilty of the murder beyond a reasonable doubt?
A Right.
Q It is your opinion in this case that they did not?
A I think it was pretty much -- yeah, I think it is pretty much one in the same issue in this case given the facts of this case.
Q And two months after a Court convicted him of first degree murder a jury found that he was a principal in the first degree to that murder, is that correct?
A Yes.

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In the Circuit Court for Baltimore County, Maryland

Kevin Wiggins
v. Case No. 88-CR-5464
State of Maryland

Reporter's Official Transcript of Proceedings
Post Conviction Hearing
April 7, 1994
Towson, Maryland

Before: Honorable John F. Fader, II, Associate Judge

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23 THE COURT: I think there is no way that I'm
24 going to be able to say, Ms. Brobst, in this case, that it was
25 not error to have this report. I don't think I would ever be

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1 able to get away with that. I do believe that it was error by
2 the attorneys not to have this report prepared.
3 The question is whether or not it is harmless
4 error or prejudicial error.
5 MR. VERRILLI: That's right. We think the
6 evidence is sufficiently powerful and is of exactly the kind,
7 exactly the kind of of evidence that the Supreme Court has
8 recognized juries must consider. That is because it is
9 important to juries making this resonable, moral deliberation
10 as to whether the defendant should live or die. This is what
11 it is all about; do we have some reason to understand how this
12 act could have happened; some reason to see this as a human

13 being, as a person who despite having been found to have done
14 something horrible, deserves some measure of forgiveness, some
15 measure of mercy or empathy. That is what it is all about.
16 That is what capital sentencing is all about.
17 THE COURT: Anything else?
18 MR. VERRILLI: That is what this evidence is all
19 about. I imagine we will need some rebuttal. There is a lot
20 more to be discussed here. I think it might make sense now
21 hear from Ms. Brobst.
22 THE COURT: What do you think about this, Ms.
23 Brobst?
24 MS. BROBST: With respect to where there was
25 error, I understand that the Court has sort of telegraphed

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1 that you will find.
2 THE COURT: I have got to find that. I don't
3 ever remember a death penalty case that there was not this
4 social history done. I think Penry has said loud and clear
5 that these things must be considered. And other cases have
6 said they must. Not to do a social history, at least to see
7 what you have got, to me is absolute error. I just -- I would
8 be flabbergasted if the Court of Appeals said anything else.
9 I really don't think that that is even a close question,
10 Ma'am.

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* * * *

[THE COURT]
24 that. So therefore, based upon the evidence that I have seen
25 I'm concluding it was error for them not to investigate it

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because I don't have any information before me to believe that they did not have this information available to them. The only explanation I have is Schlaich's, which said that I wanted to double dip. He could have gotten his double dip and have gone alternatively also.
You see, the context of this case, and I understand what you are saying, but the context of this case is that I have no reason to believe that they did have all of this information.

* * * *

Supreme Court, U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

In this case, the United States Court of Appeals for the Fourth Circuit held that under 28 U.S.C. § 2254(d)(1), a state court application of established federal law will satisfy the "objectively reasonable" standard of review set forth in *Williams v. Taylor*, 529 U.S. 362 (2000), so long as it is "minimally consistent with the facts and circumstances of the case." The question presented is:

Does defense counsel in a capital case violate the requirements of *Strickland v. Washington* by failing to investigate available mitigation evidence that could well have convinced a jury to impose a life sentence, as this Court concluded in *Williams v. Taylor* and as most Courts of Appeals have concluded, or is defense counsel's decision not to investigate such evidence "virtually unchallengeable" so long as counsel knows rudimentary facts about the defendant's background, as the Fourth Circuit held in this case.

LIST OF PARTIES

Pursuant to Supreme Court Rule 24.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Fourth Circuit.

Kevin Wiggins was the appellee below. Thomas R. Corcoran, former warden of the Maryland Correctional Adjustment Center, and J. Joseph Curran, Jr., attorney general of the State of Maryland, were appellants below. Thomas R. Corcoran has since been replaced by Sewall Smith and, pursuant to Supreme Court Rule 35.3, has been substituted as a party.

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JURISDICTION

The judgment of the Court of Appeals was entered May 2, 2002. A timely petition for rehearing and rehearing *en banc* was denied May 29, 2002. The petition for a writ of certiorari was filed on August 27, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part as follows: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence," and "nor shall any State deprive any person of life, liberty, or property, without due process of law." This case also involves the provision of the federal habeas corpus statute governing federal review of state court decisions, 28 U.S.C. § 2254, reprinted at Pet. App. 159a-162a.

STATEMENT OF THE CASE

A. Background

On September 17, 1988, Florence Lacs, an elderly white woman, was found drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland. Five days later, the police found two African Americans, Kevin Wiggins (then age 27)

and his girlfriend Geraldine Armstrong (then age 42), traveling in Ms. Lacs' car. Both were arrested and charged with murder and robbery, although the charges against Armstrong were later dropped. Wiggins had no prior criminal record.

No direct evidence established who killed Ms. Lacs. The State knew only that Wiggins was working as a painter in Ms. Lacs' apartment complex, that Wiggins and Armstrong had Ms. Lacs' car and credit cards, and that the credit cards had been used at several stores beginning on September 15.

B. The Guilt/Innocence Trial

Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, represented Wiggins. Schlaich had previously second-chaired one capital case. Nethercott had no capital trial experience, and less than one year's experience as a defense attorney. Shortly after the appointment, Schlaich left Baltimore County to work in the Harford County defender's office. He spent one day per week on his lingering Baltimore County responsibilities. JA 475-76. Soon after this case ended, Schlaich was fired as a public defender. *Id.* 472.

Wiggins waived a jury trial and was tried before the Honorable J. William Hinkel of the Baltimore County Circuit Court in July 1989. The case against Wiggins was almost entirely circumstantial.[1] The prosecution called witnesses who placed Wiggins near (but not in) Ms. Lacs' apartment at approximately 5 p.m. on September 15, where he was painting

[1] The prosecution called two jailhouse informants – John McElroy and Christopher Turner – to testify that Wiggins confessed the murder to them. On cross-examination, McElroy acknowledged that he "made up" the central elements of his testimony, and Turner was similarly discredited. Aug. 1, 1989 Tr. at 157. During closing, the prosecution disavowed these witnesses, Aug. 4, 1989 Tr. at 133, and Judge Hinkel rejected their testimony, JA 28-29.

another apartment. The State also presented forensic evidence about the crime scene. Police officers had found fingerprints in Ms. Lacs' apartment, and had found a Ryder baseball cap on the floor. Neither the fingerprints found in the apartment nor forensic evidence taken from the cap matched Wiggins. No paint residue was found in the apartment.

Among the State's witnesses was Wiggins' girlfriend, Geraldine Armstrong. According to her testimony, Wiggins had arrived at her home at 8 p.m. on the 15th in Ms. Lacs' car, and asked to come in to wash off the paint from his work. Aug. 1, 1989 Tr. at 196-97. She testified that her brother Adolphus began an argument with Wiggins that escalated to a serious altercation in which her brother pulled a gun. She then testified that she and Wiggins then left to go shopping in Ms. Lacs' car and used Ms. Lacs' credit cards. She initially denied familiarity with the Woodlawn apartments where Ms. Lacs lived, but eventually admitted that her brother Melvin lived in an apartment beneath that of Ms. Lacs. *Id.* 201.

The defense then presented its case. It consisted principally of an expert in forensic pathology who testified that Ms. Lacs died no earlier than 3 a.m. on September 17, and that Wiggins therefore could not have committed the murder on the 15th. Aug. 4, 1989 Tr. at 133.

Wiggins was convicted. The court concluded that Ms. Lacs must have been robbed before her car and credit cards were used on the evening of the 15th; the robbery must have occurred when Ms. Lacs' apartment was ransacked; and Ms. Lacs must have been murdered when the apartment was ransacked. Notwithstanding the absence of any forensic or direct evidence connecting Wiggins to the murder, the court concluded that Wiggins must have been the murderer, because Wiggins was present at the apartment complex when (in the court's view) the robbery and ransacking must have occurred,

and he had possession of the stolen items later on September 15th. JA 29-32.

C. Sentencing

Immediately after the guilty verdict on August 4, 1989, defense counsel asked for a continuance to complete "preparation to take this case to a sentencing phase." JA 33. The court granted the request, and sentencing proceedings began on October 11, 1989. Wiggins' counsel chose jury sentencing, even though they had requested a bench trial to decide guilt because, in their view, Baltimore County juries are too "bent towards guilt" and "death oriented." *Id.* 500.

At the outset of the hearing, the judge instructed the jury that "Kevin Wiggins . . . has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs." JA 53. Building on that instruction, the prosecution's opening statement repeatedly reminded the jury that Wiggins "has already been convicted . . . beyond a reasonable doubt" of murdering and robbing Ms. Lacs. *Id.* 57, 60. The prosecution then asserted that the evidence would show that Wiggins was eligible for the death penalty because he was a "principal in the first degree" in Ms. Lacs' death. The prosecution urged the jury to impose the death penalty because the aggravating circumstances outweighed any mitigating evidence that might support a life sentence.

Wiggins' lawyers opted for "retrying guilt" at the sentencing phase by contesting that Wiggins was a principal *i.e.*, the actual killer.[2] But counsel was forced to acknowledge

[2] On the eve of sentencing, defense counsel moved to bifurcate the sentencing hearing. They wanted to "retry guilt" in one phase, and then, if necessary, in a second phase, present mitigating evidence consisting of a psychiatric test that showed Wiggins was of borderline intelligence and had psychological problems. The court denied the motion. JA 34-46; Oct. 12, 1989 Tr. at 3.

in opening that "there is a guilty verdict in this case and, obviously, you are bound by that verdict. . . . He has been found guilty of first degree murder. Even if you heard all the evidence . . . and you concluded that Kevin Wiggins wasn't guilty of the murder, you have no power to do anything about that. He has been found guilty of first degree murder." JA 67-68.

The opening statement did not, however, focus only on the principalship issue. Counsel urged the jurors to "consider not only the facts of the crime," but also "who that person is." The jurors were promised that they would "hear that Kevin Wiggins has had a difficult life." Counsel stressed that the information was "an important thing . . . to consider." JA 70, 72.

The prosecution then presented its evidence, which largely mirrored its trial presentation, to establish that Wiggins was a principal in the death of Ms. Lacs. The prosecution also introduced a written presentence report prepared by the Department of Probation and Parole. *See* Md. Ann. Code art. 41 § 4-609(d) (1988) (requiring preparation and presentation of presentence report in capital cases). The report contained a brief description of Wiggins' "personal history," in which Wiggins was quoted as saying, without elaboration, that his childhood was "disgusting." JA 20. The report included a brief quote from one of Wiggins' sisters suggesting that she and Wiggins had been treated reasonably well in one of their foster homes. *Id.* 20-21. The report also contained a brief "physical and mental history" that stated that Wiggins had attempted suicide while in jail awaiting trial in this case, but otherwise had no physical, psychological, or emotional problems. *Id.* 23.

Wiggins' lawyers challenged the prosecution's factual case, much as they did at the guilt phase of the trial. They did not, however, offer any evidence to support the hypothesis that

someone other than Wiggins had the principal role in Ms. Lacs' murder, and that Wiggins was merely an accomplice. Nor did they follow through on their commitment to introduce evidence of Wiggins' difficult life. They did introduce the testimony of Dr. Robert Johnson, a criminology professor, who testified that inmates convicted of violent crimes who are serving life sentences tend to adjust well and to refrain from further violence in prison. JA 311-13. In testimony elicited by Wiggins' counsel, Dr. Johnson noted that Wiggins had committed rules infractions since being arrested for Ms. Lacs' murder and had verbally threatened jail staff. *Id.* 318.

After the defense rested, the judge again instructed the jury that "Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." JA 362. After explaining the standard for deciding whether Wiggins was a principal in the first degree, the judge then told the jury that "[i]t is your duty to weigh each of the factors, both aggravating and mitigating, to determine whether the sentence shall be life imprisonment or death." *Id.* The judge enumerated the statutory mitigating factors, and told the jury the stipulated fact that Wiggins had never before been convicted of a "crime of violence." *Id.* 367. Finally, the judge explained that, in addition to the statutory mitigators, the jury also "may consider evidence relating to the defendant's background." *Id.* 368.

In its closing, the State emphasized that "the defendant has been found guilty of the murder of Florence Lacs," and again summarized the evidence supporting the allegation that Wiggins was a principal in her death. JA 376-77.

In response, Wiggins' lawyers again conceded that Wiggins "has been convicted" and that the jury "cannot change

that." *Id.* 391. They nevertheless asked the jury to reach what counsel referred to as the "stunning conclusion . . . that you can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the murder of Ms. Lacs." JA 391 (emphasis added). Instead of contending that Wiggins was merely an accomplice and that someone else murdered Ms. Lacs, counsel contended that Wiggins could not be a "principal" because he had nothing to do with the murder. Although counsel had assured jurors that they would learn of Wiggins' "difficult life," the closing made no mention of it.

In rebuttal, the prosecution reiterated the trial judge's instruction that Wiggins "has been convicted of first degree murder and robbery" and that the jury's duty was to "consider his crime" and "weigh that . . . against what you know about his background." JA 404, 407.

The jury sentenced Wiggins to death. After concluding that he was a principal in Ms. Lacs' death, the jury found that the aggravating fact that the murder occurred in the course of a robbery outweighed any mitigating evidence. It found none of the statutory mitigating factors other than the stipulated fact that Wiggins had never been convicted of a crime of violence. JA 409. At least one juror found that Wiggins' "background" was a non-statutory mitigating factor. *Id.* 368-69, 409.

A divided Maryland Court of Appeals affirmed.

D. State Postconviction Proceedings

In 1993, Wiggins filed a petition for postconviction relief with the Baltimore County Circuit Court. The case was assigned to the Honorable John F. Fader II, who held seven days of hearings between January 7 and May 25, 1994.

The court received expert testimony from Hans Selvog, a licensed social worker who had prepared a social history of

Wiggins. Selvog testified that he had prepared social histories for death penalty cases since 1986 and had been qualified as an expert in several capital cases, including six in Maryland. JA 414-15. Judge Fader qualified Selvog as an expert. *Id.* 419.

The social history revealed that Wiggins suffered horrible abuse throughout his childhood. His mother, a chronic alcoholic, frequently left Wiggins and his sisters alone for days. Pet. App. 165a-167a. She would hide food, leaving the children to beg or pick food from trash cans. *Id.* 166a-167a. The children often went hungry for days; Wiggins ate paint chips to quell his hunger. *Id.* 167a. When his mother returned home to find that her children had eaten the food she had hidden, she would beat them with belts, straps, even furniture. *Id.* 167a-168a. She would have sex in front of the children, sometimes while they were in the same bed. *Id.* 171a. Wiggins also witnessed a boyfriend of his mother repeatedly molest his sister India. *Id.* On one occasion, according to India, Wiggins' mother punished Wiggins for playing with matches by forcing his hands against a red-hot kitchen stove burner, and then refused to take him for medical care until hours later. *Id.* 169a-171a.

As a result of being abandoned for several days, Wiggins and his sisters were placed in foster care when he was six. Pet. App. 173a. His first foster mother's methods of discipline included biting the children and twisting their flesh. *Id.* 175a-176a. That abuse led to the children being placed in a new foster home. *Id.* The second foster mother beat the children with straps and belts. *Id.* 176a. Her husband subjected Wiggins to years of sexual abuse, often on a daily basis, beginning with molestation when Wiggins was eight years old and escalating to rape sometime later. *Id.* 177a-179a. Shortly after this sexual abuse began, Wiggins lost interest in eating, and became so malnourished that he was hospitalized. *Id.*

179a. An I.Q. test taken at that time indicated a borderline retardation level of 72. *Id.* 181a.

Wiggins ran away from the second foster home at age 16. Pet. App. 184a. He lived on the street for a time, and spent brief periods in other foster homes. *Id.* 184a-188a. He eventually returned to his second foster home because it provided some stability. *Id.* 188a. After a few months, however, Wiggins was again moved. *Id.* 189a. In the next foster home, he and other foster children were raped repeatedly by the foster mother's teenage sons. *Id.* 190a. After Wiggins left the foster care system, he entered a Job Corps program, where his supervisor befriended and then sexually molested him. *Id.* 192a-193a. When Wiggins was 18, an examination indicated mental retardation, cranial pathology, and possible head trauma. *Id.* 192a.

Selvog testified that Wiggins' experiences "left him confused" and "frightened constantly." JA 430. Wiggins tried to deal with that fear by "trying not to think about anything." *Id.* He was so traumatized that in one instance in his childhood he tried to fly out a window. *Id.* By age eight he displayed short-term memory problems, hallucinations, and "blank-out spells." *Id.* 438. Selvog found that disorientation and "staring into space" were consistent symptoms throughout Wiggins' foster placements, *id.* 445, and he testified that Wiggins' mental and emotional problems were characteristic results of the sort of abuse and neglect reported in the social history, *id.*

Wiggins' trial counsel also testified. Nethercott acknowledged that she had never participated in a capital trial before defending Wiggins, had less than one year's experience as a public defender when she began representing him, and had participated in only one or two jury trials of any kind. *Id.* 514-15. She testified that Schlaich was lead counsel, and that the work was distributed evenly between them until Schlaich left

for the Harford County office, not long after they were appointed. At that point she took "primary responsibility for preparation of the case" and admitted that she "was frankly overwhelmed." *Id.* 532, 529. She explained, however, that developing mitigating evidence in preparation for sentencing was Schlaich's responsibility, not hers. *Id.* 539-40.

Schlaich testified that he had previously second-chaired one capital case. He also testified that he left the Baltimore County public defender's office in 1988 to work in the Harford County office, and thereafter spent about one day a week on the "two major cases" he still had pending in Baltimore County, one of which was Wiggins' case. JA 476. Schlaich confirmed that, after he left for Harford County, Nethercott "did most of the work" on Wiggins' case. *Id.* 478. Schlaich claimed Nethercott had primary responsibility for developing mitigation evidence. *Id.* 485.

Schlaich further stated that he and Nethercott decided well in advance of trial to "retry the factual case" at the sentencing phase. JA 485-86. Schlaich explained that he preferred not to use a "shotgun approach" of presenting multiple defenses in the same proceeding. *Id.* 504-05. Schlaich also acknowledged that he did not retain a forensic social worker to prepare a social history, even though funds were available to do so, and even though he was aware that public defenders in Maryland routinely prepared social histories in other capital cases. *Id.* 487-88, 489-90. Schlaich was not familiar with this Court's decisions in *Lockett v. Ohio*, *Eddings v. Oklahoma*, and *Penry v. Lynaugh*. *Id.* 491.

Schlaich initially claimed that he knew the details of Wiggins' nightmarish upbringing, but quickly backtracked, clarifying that he knew only "that [information] as it was reported in other people's reports," *i.e.*, the records of the Department of Social Services in his possession. *Id.* 490-91.

Finally, Schlaich opined, in response to a hypothetical question from the State, that presenting mitigating evidence sometimes allowed the State to bring out additional information that made the defendant seem more dangerous. *Id.* 506. Schlaich did not testify that there was anything about Wiggins' background that could have undermined a mitigation case in this way. The State did not try to elicit any such testimony or otherwise introduce evidence of past violence or other harmful facts about Wiggins.

The court also received expert testimony from Gerald Fisher, a criminal defense attorney and law professor with extensive experience working on capital cases.[3] Judge Fader qualified Fisher as an expert on attorney competence in capital cases. JA 560. Fisher testified that Wiggins' trial attorneys did not investigate mitigation evidence as required by applicable professional norms. *Id.* 566-67. Fisher explained that training conferences – including a conference Schlaich admitted he had attended, JA 479-80, 569 – had emphasized for years the importance of investigating and presenting a mitigation case. *Id.* 568-69. In Fisher's opinion, capital defense counsel cannot make a "sound strategic decision" not to investigate a client's background because it is imperative to know how strong the mitigation case is before choosing a sentencing strategy. *Id.* 568-69, 575-76. As he put it, "[y]ou can't make your decisions in a vacuum." *Id.* 599-600.

He explained that Wiggins' background of "deprivations and neglect" presented "among the strongest" mitigation cases he had "ever seen," and that Wiggins' lawyers fell far below the minimum required of capital counsel in not developing and presenting this evidence. JA 567; *see also id.* 573-74. Fisher acknowledged that presenting mitigation evidence might sometimes open the door to unfavorable information. He

[3] Fisher is now a judge of the Superior Court of the District of Columbia.

explained, however, that such a risk cannot justify a failure to investigate:

> Every defense has problems but you have to go out and investigate it, develop it, decide on the presentation and then weigh what is going to go on with that presentation in determining whether to use it or not to use it. So as a kind of preliminary step that wasn't done.

Id. 581. Fisher also testified that both mitigation evidence about Wiggins as an individual and evidence that there was reasonable doubt whether Wiggins committed the crime could have been consistently presented at sentencing, and that he had seen defense attorneys rely on such a strategy. *Id.* 591-92.[4]

E. State Postconviction Decisions

At the conclusion of the state postconviction proceedings, Judge Fader ruled from the bench that trial counsel's performance fell below minimum Sixth Amendment standards as established in *Strickland v. Washington*, 466 U.S. 668 (1984): "[I]t was error for [Wiggins' counsel] not to investigate" mitigating evidence. JA 605; *see also id.* 604-05. He then stated:

> I don't ever remember a death penalty case that there was not this social history done. . . . Not to do a social history, at least to see what you have got, to me is absolute error. I just – I would be flabbergasted if the Court of Appeals said anything else. I really don't think that that is even a close question . . . .

[4] Geraldine Armstrong was also called as a witness at the postconviction hearing. She invoked the Fifth Amendment in response to all questions about her involvement in the murder and robbery of Ms. Lacs. Mar. 28, 1994 Tr. at 75-77.

Id. 605. The court also found that Wiggins' lawyers had no prior knowledge of the mitigation evidence contained in the social history. *Id.* 606. Having ruled for Wiggins on the performance prong of the *Strickland* test, Judge Fader reserved the issue of prejudice and announced that he would issue a decision within 60 days. Apr. 7, 1994 Tr. at 75; May 25, 1994 Tr. at 14-15.

Three and a half years later, the court issued a written decision rejecting Wiggins' *Strickland* claim. Without mentioning his own prior ruling that counsel's performance fell below minimum professional requirements, the judge opined that counsel's performance was immune from Sixth Amendment challenge because Schlaich made a "tactical" decision to retry guilt. The court's opinion contains no finding that Wiggins' lawyers conducted an adequate investigation into mitigation evidence or made an *informed* decision to retry guilt to the exclusion of a mitigation case. The court simply held that "when the decision not to investigate [] is a matter of trial tactics, there is no ineffective assistance of counsel." Pet. App. 155a. The court's ruling confirmed that Wiggins' social services records contained no evidence of physical or sexual abuse. *Id.* 142a n.269.

The Maryland Court of Appeals affirmed. Pet. App. 121a-127a. Without mentioning the contrary findings made by the postconviction court that heard the evidence, the appeals court stated that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood" and, specifically, that the social services records "recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." *Id.* 121a. Because the court believed that Wiggins' lawyers "*were* aware of his background," it rejected Wiggins' Sixth Amendment claim. *Id.* 123a-126a.

F. Federal Postconviction Review

Wiggins filed a timely petition for relief in the United States District Court for the District of Maryland, pursuant to 28 U.S.C. § 2254, on August 6, 1999. Applying the standard of review set forth in 28 U.S.C. § 2254(d)(1), as explained in *Williams v. Taylor*, 529 U.S. 362, 412 (2000), Chief Judge Motz granted the petition.

The court invalidated Wiggins' conviction because the Maryland courts had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), which held that a criminal conviction denies due process if a reasonable factfinder could not have concluded that every element of the offense was proved beyond a reasonable doubt. Pet. App. 42a-50a. The district court also invalidated Wiggins' death sentence on the ground that the state courts had unreasonably applied *Strickland*. That result, the court concluded, followed from *Williams*. As in *Williams*, Wiggins' counsel had failed to investigate and prepare a case in mitigation. Prejudice existed because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a.

The court declined to distinguish *Williams* on the ground that counsel's conduct here was the result of a legitimate tactical decision. First, the court concluded that counsel's decision to "retry" guilt was uninformed, and thus unreasonable, because counsel had no appreciation of the powerful mitigation evidence available. Although counsel had Wiggins' social services records, Chief Judge Motz reviewed those records and confirmed the state postconviction court's factual finding that they did not contain the evidence of squalor and abuse presented during postconviction proceedings. Pet. App. 53a-54a. The district court therefore rejected the Maryland Court of Appeals' "erroneous assumption that much

of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel." *Id.* 54a n.16.

Second, the district court found that counsel's choice here was so ill-advised that it could not be justified even if it had been informed. Pet. App. 55a. Because Wiggins had no criminal record, there was no danger that the State would bring out damaging evidence in response to a case in mitigation. *Id.* 55a & n.17. Moreover, mitigation evidence could have been introduced in concert with evidence that Wiggins did not commit the murder, to present "an effective argument that Wiggins had been made the pawn of others who were responsible for the murder." *Id.* 55a n.17; *see also id.* 44a n.9.

The Fourth Circuit reversed. Invoking circuit precedent predating this Court's decision in *Williams v. Taylor*, the court held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. Applying that standard, the court rejected Wiggins' ineffectiveness claim.[5] The court believed that *Strickland* warranted relief only for a "particularly glaring failure of counsel's duty to investigate," and concluded that "avoidance of conflicting arguments supported the limited investigation into social history." Pet. App. 19a, 23a. The court also concluded that Wiggins' counsel knew the facts of Wiggins'

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[5] The Fourth Circuit also reversed the district court's decision with respect to the conviction. Pet. App. 17a. Chief Judge Wilkinson concurred. Though stating his view that Wiggins "very probably" committed the crime of which he was convicted, the Chief Judge was unable to "say with certainty that he did so," and noted "unexplained items" of evidence such as "the unidentified fingerprints, baseball cap, fibers and hairs," as well as the fact that Wiggins "had no prior record." *Id.* 24a & n.*.

childhood "as they existed in the presentence investigation report and social services records," including (in the court's view) that there "were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; [and] that there had been homosexual overtures made toward him by a job corps supervisor." *Id.* 20a. The court did not mention the specific findings of the state postconviction court that Wiggins' counsel did not know about Wiggins' history of abuse and that the social services records did not document that history. Nor did the appeals court mention the district court's finding, based on an examination of the social services records, *id.* 53a-54a nn.15-16, that those records did not contain evidence of abuse.

Writing separately, Judge Niemeyer questioned whether "the State court reasonably applied *Strickland*," and opined that "[counsel] could have insisted on arguing liability and still have maintained that any death sentence would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." Pet. App. 25a. He nevertheless concurred, but with "less confidence." *Id.* 26a.

SUMMARY OF ARGUMENT

As this Court's ruling in *Williams v. Taylor* makes clear, the decision of the Maryland Court of Appeals in this case was both "contrary to" and an "unreasonable application of" *Strickland v. Washington*. Wiggins' trial counsel completely failed to develop the powerful mitigation case available to them. The jury that sentenced Wiggins to death never heard voluminous compelling evidence of Wiggins' horrific childhood – including repeated physical and sexual abuse – and his marginal intelligence. Wiggins was thus denied his constitutional right to effective assistance of counsel.

It is an "obvious truth" that "in our adversary system of criminal justice, any person haled into court, who is too poor to afford a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *see also Powell v. Alabama*, 287 U.S. 45 (1932). It is equally clear that "'the right to counsel is the right to effective assistance of counsel.'" *Strickland*, 466 U.S. at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). Indeed, "'[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective . . . .' Unless the accused receives the effective assistance of counsel, 'a serious risk of injustice infects the trial itself.'" *United States v. Cronic*, 466 U.S. 648, 655-56 (1984) (citation omitted). Counsel's duty is "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland*, 466 U.S. at 688.

In the capital sentencing context, a "reliable adversarial testing process" generally requires that counsel present to the sentencing jury evidence of "the character and record of the individual offender and the circumstances of the particular offense," to allow the jury to reach the "reasoned moral response" to punishment required by the Constitution. *Eddings v. Oklahoma*, 455 U.S. 104, 111-12 (1982) (internal quotation marks and citation omitted). For only when all of the available information about the offender and the offense is subjected to the adversarial process "can [we] be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. 782, 797 (2001) (internal quotation marks and citation omitted).

In *Williams*, this Court emphasized that, to meet the constitutional imperative established in *Strickland*, counsel must conduct the "requisite diligent investigation" into

mitigating evidence. In the wake of *Strickland*, a powerful judicial consensus has emerged among the federal courts of appeals and state supreme courts that "defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett,* 286 F.3d 230, 236-37 (5th Cir. 2002) (en banc) (internal quotation marks and citation omitted), *petition for cert. filed* (U.S. filed June 13, 2002) (No. 01-10886). "Prevailing norms of practice," including standards issued by the American Bar Association, reflect the same consensus.

The Maryland Court of Appeals nevertheless held that counsel had performed effectively, and the Fourth Circuit upheld that ruling under § 2254(d) on the ground that counsel had made a "tactical" choice to focus exclusively on retrying guilt to the exclusion of making a mitigation case. But *Strickland* precludes deference to "tactical" choices when, as here, they are not supported by adequate prior investigation. The plain fact is that Wiggins' counsel did not know about the compelling mitigation evidence available. To defer to the "strategic" choices of counsel in such circumstances is contrary to, and an objectively unreasonable application of, *Strickland*.

Moreover, even if counsel's decision to retry guilt at the expense of presenting mitigation evidence could be considered "tactical," it was "virtually inexplicable," Pet. App. 55a, and any state decision upholding it is objectively unreasonable. Counsel knew well in advance of the hearing that the sentencing jury would receive a presentence report briefly describing Wiggins' personal history and mental health status. The decision to retry guilt thus did not remove the question of Wiggins' background and character from the sentencing process, but merely resulted in Wiggins' life history being assessed on the basis of two desultory and inaccurate paragraphs in the presentence report, and not on the basis of the

powerful mitigation evidence that could have been presented by Wiggins' own advocates.

In addition, counsel did not even follow through on their purported strategy of focusing exclusively on retrying guilt. Instead, counsel told the jury that it would hear of Wiggins' "difficult life," then presented literally nothing of that life, offering instead only testimony that Wiggins would "settl[e] into jail life." Counsel thus adopted the "shotgun approach" he testified he hoped to avoid, while omitting all of the compelling mitigation evidence.

As if that were not enough, the decision to forgo mitigation evidence was particularly egregious because such evidence would have complemented, rather than undermined, counsel's chosen "strategy" of attempting to convince the jury that Wiggins was not a principal to the murder. That strategy collapsed of its own weight due to counsel's failure to offer the jury any alternative principal despite the ready existence in the record of such a person. But the critical point recognized by both the district court and Judge Niemeyer is that much of the mitigation evidence would have *supported* counsel's principalship argument by suggesting that Wiggins was susceptible to manipulation and could easily have been made the pawn of others who were responsible for the murder. In short, counsel's failure to investigate and present Wiggins' powerful mitigation evidence was deficient performance, and the Maryland courts' opposite conclusion is both contrary to, and an unreasonable application of, *Strickland*.

Finally, Wiggins was obviously prejudiced by his counsel's failures. That conclusion follows *a fortiori* from *Williams*. The mitigation evidence that competent trial counsel would have discovered concerning Wiggins' background was even more compelling than the evidence left undiscovered in *Williams*, and the aggravating evidence was far weaker because,

in stark contrast to Williams, Wiggins had no criminal record at all. The conclusion that the compelling mitigation evidence "might well have influenced the jury's appraisal of his moral culpability" is inescapable. Accordingly, relief under § 2254(d) is warranted, and the Fourth Circuit's contrary conclusion should be reversed.

ARGUMENT

I. THE PERFORMANCE OF WIGGINS' COUNSEL FELL FAR SHORT OF THE STANDARD OF EFFECTIVE REPRESENTATION SET FORTH IN *STRICKLAND V. WASHINGTON.*

Because this case was brought pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act, the question before this Court is whether the adjudication of Wiggins' Sixth Amendment claim by the Maryland courts "resulted in a decision that [is] contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by this Court. 28 U.S.C. § 2254(d)(1). In *Williams v. Taylor*, this Court clarified that relief is warranted under § 2254 if a state court's application of clearly established federal law is "objectively unreasonable," 529 U.S. at 409. Thus, contrary to the Fourth Circuit's ruling in this case, state court rulings do not pass muster merely by being "minimally consistent with the facts and circumstances of the case." Pet. App. 11a. And *Strickland v. Washington* is indisputably "clearly established" law. Under *Strickland*, counsel's performance is ineffective for Sixth Amendment purposes if it is not reasonable "under prevailing professional norms." 466 U.S. at 688. As will be shown, the decision of the Maryland courts that Wiggins' lawyers fulfilled their Sixth Amendment obligations is both contrary to, and an objectively unreasonable application of, *Strickland*. Indeed, that conclusion follows directly from *Williams*, which applied

Strickland under § 2254 to invalidate a death sentence where defense counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396.

A. *Strickland* Generally Requires Defense Counsel in Capital Cases to Conduct a Thorough Investigation for Mitigation Evidence.

To assess what *Strickland* demands of defense counsel in a capital case, it is critical to understand the unique nature of capital sentencing. At a capital sentencing hearing, the defendant stands convicted of murder, and the issue is whether the defendant should be condemned to die. The process is structured to focus the sentencer on the *extent* of the defendant's personal culpability. Indeed, for a quarter century, this Court's Eighth Amendment jurisprudence has required that capital sentencing procedures implement "the principle that punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319-20 (1989) (explaining *Eddings*, 455 U.S. at 111 and *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). A capital sentencer must, therefore, be afforded the opportunity to assess "the character and record of the individual offender," as well as "the circumstances of the particular offense." *Eddings*, 455 U.S. at 112 (internal quotation marks and citation omitted). As this Court has explained,

> [i]f the sentencer is to make an individualized assessment of the appropriateness of the death penalty, evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry v. Lynaugh, 492 U.S. at 319 (internal quotation marks and citation omitted); *see also Penry v. Johnson*, 532 U.S. at 797; *Johnson v. Texas*, 509 U.S. 350, 375 (1993) (O'Connor, J., dissenting). The sentencer's constitutionally prescribed task is thus to render "a reasoned moral response" to the unique individual circumstances of the capital defendant. *Penry v. Lynaugh*, 492 U.S. at 327; *see also California v. Brown*, 479 U.S. 538 (1987) (O'Connor, J., concurring); *Eddings*, 455 U.S. at 111 (consideration of offender's life history is a "constitutionally indispensable part of the process of inflicting the penalty of death").

To ensure that capital sentencers can fulfill this obligation, this Court has repeatedly struck down state-imposed barriers to full consideration of such evidence. *See, e.g., Eddings*, 455 U.S. at 113-15 (invalidating sentence where state decision allowed as mitigation evidence only evidence that would tend to excuse criminal liability); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978) (invalidating Ohio law that did not permit consideration of, *inter alia*, defendant's character, age, prior record, lack of specific intent to cause death, and role in the crime); *Penry v. Lynaugh*, 492 U.S. at 322 (reversing conviction because jury had no vehicle to express a "reasoned moral response" to evidence of mental retardation and childhood abuse); *Skipper v. South Carolina*, 476 U.S. 1, 2 (1986) (reversing conviction when State prohibited consideration of evidence that defendant "made a good adjustment" during his time in jail); *Sumner v. Shuman*, 483 U.S. 66, 77-78 (1987) (invalidating statute that prohibited individualized consideration for defendant convicted of murder while serving a life sentence); *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (invalidating Florida sentencing instructions that forbade jury from considering nonstatutory mitigating evidence); *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that State may not restrict juries to giving effect only to mitigating circumstances as to which all jurors agree).

A lawyer's failure to prepare and present a case in mitigation can threaten the reliability of the sentencer's "reasoned moral response" fully as much as these state-imposed impediments. *See, e.g., Williams*, 529 U.S. at 396-98; *see also Penry v. Johnson*, 532 U.S. at 797 (jury must "be able to consider and give effect to [a defendant's mitigating] evidence in imposing sentence") (internal quotation marks and citation omitted; alteration in original). As the Court observed in a related context, defense counsel's failure to conduct an adequate investigation "puts at risk both the defendant's right to an ample opportunity to meet the case of the prosecution, and the reliability of the adversarial testing process." *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986) (internal quotation marks and citation omitted). The prosecution's case for death will usually focus on the facts of the crime, harm to the victim's family, and the negative aspects of the defendant's character and life history. To meet that case, defense counsel must give the jury a reason to spare the defendant's life. Typically, that will mean adducing evidence of the defendant's background and character that might "reduce [a defendant's] moral responsibility . . . to a level at which capital punishment would strike [a] juror as excessive." *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) (Posner, J.). It is only when the sentencing jury has the opportunity to consider all available mitigation evidence, and the prosecution's case for death has thus been subject to full adversarial testing, that "we can be sure that the jury has . . . made a reliable determination that death is the appropriate sentence." *Penry v. Johnson*, 532 U.S. at 797 (internal quotation marks and citation omitted).

Williams v. Taylor reaffirmed in the clearest possible terms that capital defense counsel's duty under *Strickland* must be measured by reference to the unique requirements of capital sentencing, and that counsel's duty therefore must generally encompass a thorough investigation of the defendant's life

history. *See Strickland*, 466 U.S. at 691 (explaining counsel's "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"). Trial counsel in *Williams* failed to conduct an investigation that would have uncovered evidence of Williams' "nightmarish" childhood. This Court held that trial counsel had failed to fulfill their "obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396. Justice O'Connor (joined by Justice Kennedy) reiterated in concurrence that Williams' counsel had failed to conduct the "requisite, diligent investigation" into Williams' "troubling background and unique personal circumstances." *Id.* at 415 (O'Connor, J., concurring).

Williams broke no new ground. It merely confirmed the consistent understanding of numerous courts of appeals that *Strickland* requires a thorough investigation for mitigation evidence, and that counsel's failure to do so constitutes deficient performance absent an extremely strong reason for believing such an investigation unwarranted. As the *en banc* Fifth Circuit recently held unanimously, "we consider it indisputable that, in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial, independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d at 236-37 (internal quotation marks and citation omitted). Indeed, it is well-established in the courts of appeals that "[i]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999) (internal quotation marks and citation omitted); *see also Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994) (professional norms require defendant's lawyers "to collect as much information as possible about [the defendant] for use at the penalty phase of his state court trial"); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994) ("An attorney has

a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigation evidence."); *Coleman v. Mitchell*, 268 F.3d 417, 450 (6th Cir. 2001) (case law "has strongly established defense counsel's Sixth Amendment duty to independently investigate in preparation for the penalty phase of a capital trial"); *see also Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001) (en banc); *Jermyn v. Horn*, 266 F.3d 257, 304-08 (3d Cir. 2001); *Emerson v. Gramley*, 91 F.3d at 905-07.

The state courts have consistently interpreted *Strickland* the same way. Thus, "the failure to *present* mitigating evidence at trial can be reasonable if shown to be the result of [a] tactical decision, the failure to *investigate* the existence of such evidence is ineffective assistance of counsel." *State ex rel. Busby v. Butler*, 538 So. 2d 164, 171 (La. 1988); *see also Rose v. Florida*, 675 So. 2d 567, 572 (Fla. 1996) ("It is apparent from the record that counsel never attempted to meaningfully investigate mitigation, and hence violated the duty of counsel to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence.") (internal quotation marks and citation omitted); *Goad v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996) ("[C]ounsel's duty to investigate and prepare for a capital trial encompasses both the guilt and sentencing phases."); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002) ("[I]t appears that neither [defendant's] defense counsel conducted any investigation . . . . If there was no investigation, then their performance was deficient."); *Turpin v. Christenson*, 497 S.E.2d 216, 227 (Ga. 1998) ("[B]efore selecting a strategy, counsel must conduct a reasonable investigation into the defendant's background for mitigation evidence to use at sentencing."); *Illinois v. Morgan*, 719 N.E.2d 681, 704 (Ill. 1999) ("[D]efense counsel has a duty to make a reasonable investigation for mitigation evidence to present at the capital

sentencing hearing, or must have a sound reason for failing to make a particular investigation."); *Pennsylvania v. Smith*, 675 A.2d 1221, 1233 (Pa. 1996) (finding counsel ineffective when "[t]rial counsel neither pursued nor presented any evidence of mental state at the penalty phase even though some evidence may have existed"); *Delaware v. Wright*, 653 A.2d 288, 299 (Del. Super. Ct. 1994) ("While there is no absolute duty to present all potentially mitigating evidence for use at the penalty stage, defense counsel has a general duty to investigate potentially mitigating evidence.").

This powerful judicial consensus mirrors a comparable unanimity among professional organizations and commentators. This Court has repeatedly observed that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688-89; *see also id.* (citing *ABA Standards for Criminal Justice*); *Williams*, 529 U.S. at 396 (relying on *ABA Standards for Criminal Justice* in finding counsel ineffective). For decades, standards promulgated by the ABA and other organizations have emphasized that undertaking a thorough investigation for mitigating evidence is one of the core responsibilities of counsel in a capital case. The *ABA Standards* upon which this Court relied in *Williams*, 529 U.S. at 396, provide that "[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to the facts relevant to the merits of the case and the penalty in the event of conviction." 1 *ABA Standards for Criminal Justice* 4-4.1 (2d ed. 1980).

The *American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (Feb. 1989) similarly state that "immediately upon counsel's entry into the case," counsel in a capital case "should conduct independent investigations relating to the

guilt/innocence phase and to the penalty phase of a capital trial." Guideline 11.4.1(A). For the sentencing phase, the investigation "should comprise efforts to discover all reasonably available mitigating evidence," *id.* 11.4.1(C), and counsel should "seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case," *id.* 11.8.3(A); *see also* National Legal Aid and Defender Association, *Standards for the Appointment and Performance of Counsel in Death Penalty Cases* Standard 11.4.1 (1988) (adopting similar standards).[6]

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[6] Widely available trial manuals promulgated by experienced capital litigators similarly emphasize the importance of an early, thorough investigation. *See, e.g.*, Molly T. Johnson & Laural L. Hooper, Federal Judicial Center, *Resource Guide for Managing Capital Cases* 13 (2001) ("defense counsel at the very least will have to investigate statutory and nonstatutory mitigating factors in preparing an adequate defense"); Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998), *available at* http://www.uscourts.gov/dpenalty/1COVER.htm ("In order to effectuate the defendant's right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history."); 3 Anthony Amsterdam, *Trial Manual 5 for the Defense of Criminal Cases* § 468-A, at 307 (1989) (in a capital case, "[a]n exhaustive investigation of the defendant's background . . . is indispensable"); The Equal Justice Initiative of Alabama, *Alabama Capital Defense Trial Manual* 31 (3d ed. 1997) ("No capital case can be adequately litigated without your having first conducted a painstakingly thorough investigation into . . . the defendant's personal background and his or her life history."); 1 *Tools for the Ultimate Trial: Tennessee Death Penalty Defense Manual* 5.4 (3d ed. 1992) ("Defense investigation is the only weapon available to hinder the state's penchant for hyperbole . . . ."); Nebraska Commission on Public Advocacy, *Standards for Indigent Defense Services in Capital and Non-Capital Cases* Standard VIII (1996) ("The investigation for the sentencing phase must be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all mitigating

In short, there is an overwhelming consensus, as *Williams* confirms, that defense counsel in a capital case must conduct a reasonable investigation into potential mitigation evidence in order to ensure that the sentencer has the opportunity to render a "reasoned moral response" to the defendant's background and character, and thereby ensure the "reliable adversarial testing process" required by *Strickland*.

B. The Performance of Wiggins' Trial Counsel Fell Far Short of This Established Standard.

Wiggins' counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background." *Williams*, 529 U.S. at 396. Because they failed to undertake the "requisite diligent investigation," *id.* at 415 (O'Connor, J. concurring), they failed to develop a powerful mitigation case that could well have convinced the jury to spare Wiggins' life.

The Maryland courts nonetheless held that Wiggins' lawyers had performed effectively, and the Fourth Circuit upheld that ruling under § 2254(d), on the ground that counsel had made a reasonable tactical decision to "retry guilt" to the exclusion of making a mitigation case. As will be shown, that

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evidence . . . .").

Commentators have also recognized that "reasonable counsel must investigate the defendant's background and present some mitigating evidence." Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 Stan. L. Rev. 461, 491 (1987); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 341-42 (1993) ("[E]xperienced capital defense attorneys categorically reject the idea that the utility of evidence relating to the defendant's background or mental health can be determined before an investigation."); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 323-25 (1983) (same).

result is objectively unreasonable under *Strickland* for two fundamental reasons.

First, Wiggins' counsel could not possibly have made a "reasonable" tactical decision to retry guilt without first having thoroughly investigated mitigation. Ignorant of the powerful mitigation case available to them, they were in no position to know whether "retrying guilt" was a more propitious strategy than presenting a case in mitigation. Thus, Wiggins' lawyers neither made "reasonable investigations" into Wiggins' life history, nor made a "reasonable decision" that made such an investigation "unnecessary," *Strickland*, 466 U.S. at 691.

Second, even apart from the failure to investigate, counsel's failure to present mitigation evidence was – in the words of the district court – "virtually inexplicable" in light of what counsel knew before the sentencing proceeding and did at that proceeding. Pet. App. 55a. As early as July 1989, Wiggins' lawyers knew that a presentence report would be submitted to the jury containing a parole officer's rendition of Wiggins' personal history, which set forth an innocuous description of Wiggins' life history and mental health. By not answering that report, Wiggins' lawyers left the jury with the false and injurious impression that his background provided no basis for mitigation. Moreover, contrary to Schlaich's postconviction testimony, Wiggins' lawyers did not focus solely on retrying guilt, and thus cannot justify their failure to develop and present mitigation evidence on that basis. Wiggins' lawyers told the sentencing jury that they would present evidence of his "difficult life" and then failed to so, and instead made a passing stab at mitigation by putting on an expert who suggested that violent offenders adapt well to prison if given a life sentence. Counsel's failure was all the more egregious because the mitigation evidence would have

bolstered counsel's efforts to prove that Wiggins was not a principal in Ms. Lacs' murder.

1. Wiggins' Lawyers Did Not Conduct the Requisite Diligent Investigation into Mitigation Evidence Before Deciding to Retry Guilt.

The decision of the Maryland Court of Appeals cannot be defended as objectively reasonable on the ground that the purported choice by Wiggins' lawyers to "retry guilt" absolved them of their duty to investigate his personal history. It has never been the law that all decisions labeled "tactical" are *per se* beyond reproach. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). *Strickland* imposes a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and requires that "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances." 466 U.S. at 691. Deciding at the outset to retry guilt rather than develop a case in mitigation is not a "reasonable decision" that makes investigation into mitigation unnecessary, for the obvious reason that counsel cannot know until after investigation whether the mitigation case would be a stronger basis for avoiding a death sentence.

Legions of cases have interpreted *Strickland* to preclude deference to tactical choices unsupported by adequate prior investigation. As the Eleventh Circuit has noted, "case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Horton v. Zant*, 941 F.2d 1449, 1462 (11th Cir. 1991); *see also Coleman v. Mitchell*, 268 F.3d at 447-54 (counsel could not make a reasoned decision to forgo mitigation in favor of a residual doubt defense because

counsel had not investigated, and therefore did not realize he could have presented a powerful case based on the defendant's abusive childhood); *Combs v. Coyle*, 205 F.3d 269, 288 (6th Cir. 2000) (finding *Strickland* violation, even though counsel's decision could "be considered a strategic one, [because] it was a decision made without undertaking a full investigation"); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) (counsel's decision to focus on "sympathy and mercy," rather than a mitigation case, was unreasonable when counsel did not thoroughly investigate available mitigation evidence before choosing his strategy); *Antwine v. Delo*, 54 F.3d 1357, 1367 (8th Cir. 1995) ("if limiting the investigation was not reasonable, then neither was the subsequent strategic choice"); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("Thus, our case law rejects the notion that a strategic decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.") (internal quotation marks and citation omitted).[7] Indeed, in the absence of a thorough investigation, counsel cannot "competently advise [a client] regarding the meaning of mitigation evidence and the availability of possible mitigation strategies," much less make an informed decision about which course to pursue.

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[7] State courts have done the same. As the Supreme Court of Georgia observed, "an attorney's strategic decision is not reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." *Turpin v. Christenson*, 497 S.E.2d at 227 (internal quotation marks and citation omitted); *see also Illinois v. Orange*, 659 N.E.2d 935, 950 (Ill. 1995) (deference to strategic decisions not to present mitigation evidence "is not warranted where there is proof that the lack of mitigating evidence is due to counsel's failure to properly investigate and prepare the defense."); *Rose v. Florida*, 675 So. 2d at 572 (counsel's decision "was neither informed nor strategic" when "there was no investigation of options or meaningful choice"); *Delaware v. Wright*, 653 A.2d at 301 ("[B]efore deciding not to use such [mitigation] information, defense counsel must have adequately investigated the mitigating evidence available and made a strategic choice not to use it.").

Battenfield v. Gibson, 236 F.3d at 1229; *accord Coleman v. Mitchell*, 268 F.3d at 447; *see also Strickland*, 466 U.S. at 691 (counsel has a duty "to consult with the defendant on important decisions . . . in the course of the prosecution").

The Fourth Circuit held that the Maryland Court of Appeals applied *Strickland* reasonably because *Strickland* requires relief only for a "particularly glaring failure of counsel's duty to investigate," and a strategy of "avoid[ing] conflicting arguments *supported limited investigation* into social history." Pet. App. 19a, 23a (emphasis added). But even if defense counsel could reasonably have concluded that potential sentencing strategies were "conflicting" and that only one should be presented (and here counsel neither did so nor reasonably could have done so, *see infra* pages 37-45), they could not have made an informed decision between options without first investigating them thoroughly and knowing their respective strengths.

Counsel's failure to conduct the "requisite diligent investigation" was particularly egregious because doing so was standard practice in Maryland at the time of Wiggins' trial, and Wiggins' lawyers knew that their colleagues routinely did so.[8] JA 487-88. Moreover, this Court's decisions had spoken clearly about the centrality of mitigation evidence in capital sentencing proceedings. *See, e.g., Penry v. Lynaugh*, 492 U.S. at 319; *see also supra* pages 21-23.

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[8] Gerald Fisher, an expert for the defense in Wiggins' state habeas proceedings, testified that in Maryland during the mid-1980s, there were numerous educational conferences for capital defense lawyers – which Schlaich admitted attending. At these conferences, counsel were repeatedly and unambiguously told "that they needed to do the psycho-social history and to work it up." JA 568-69. This uncontradicted testimony made clear that "it was a normative standard at the time this case came in. Indeed, years beforehand." *Id.*

Nothing constrained Wiggins' lawyers from developing such evidence. Schlaich testified that he knew that funds were available to hire an expert to prepare the kind of social history that was presented at the postconviction proceedings. JA 486-87, 489-90. *See Delaware v. Wright*, 653 A.2d at 298 n.10 ("the failure to investigate [defendant's] mental and emotional history cannot be excused based upon financial constraints" because the court approved funds to pay experts). Moreover, Wiggins' lawyers had ten months before the guilt/innocence trial to develop mitigation evidence, and received an additional two-month continuance after the conviction for the express purpose of developing such evidence. *Cf. Hall v. Washington*, 106 F.3d 742, 746 (7th Cir. 1997) (finding ineffective assistance where "[s]ix weeks elapsed between the conviction and the sentencing hearing" and the defendant's lawyers "did practically nothing to advance his case"). Practical realities thus did not require counsel to limit one line of investigation in favor of others they judged more potentially fruitful.

The record also reveals one obvious explanation for the failure to investigate: Each of Wiggins' lawyers believed the other was responsible for developing the case in mitigation. Nethercott testified that Schlaich had that responsibility. JA 540. Schlaich testified that Nethercott had that responsibility. JA 485. Where "[e]ach lawyer testified that he believed that the other was responsible for preparing the penalty phase," the failure to investigate must have "resulted not from an informed judgment, but from neglect." *Harris v. Dugger*, 874 F.2d 756, 763 (11th Cir. 1989); *see also Bean v. Calderon*, 163 F.3d 1073, 1079 (9th Cir. 1998) (same); *Turpin v. Christenson*, 497 S.E.2d at 228 (same).

Nor can the decision of the Maryland Court of Appeals be defended as objectively reasonable on the ground that Wiggins' lawyers had – by virtue of obtaining the social services records

– done enough to permit a reasonable tactical decision. Nethercott did not testify as to any knowledge of mitigation evidence, and Schlaich testified that he knew only what was in "other people's reports." JA 490-91. The state postconviction trial judge who heard that testimony, and reviewed the relevant evidence, specifically found that there was no "mention of abuse against Wiggins in" the social services records, Pet. App. 142a n.269, and that Wiggins' counsel did not know of the powerful mitigation evidence contained in the social history submitted during postconviction proceedings, JA 606.

As federal and state courts applying *Strickland* have consistently held in comparable circumstances, counsel's knowledge of the rudimentary facts contained in Wiggins' social services records does not *discharge* the duty to investigate, but *triggers* it. *See, e.g.*, *Lockett v. Anderson*, 230 F.3d 695, 714 (5th Cir. 2000) (finding ineffectiveness where "there was enough information before counsel . . . to put him on notice" that he should have pursued further investigation); *Jackson v. Herring*, 42 F.3d at 1367 (counsel had "a small amount of information" that necessitated further inquiry); *Kenley v. Armontrout*, 937 F.2d 1298, 1308 (8th Cir. 1991) (counsel ineffective when "his belief that mitigating evidence was too old and insubstantial resulted from his failure to follow available leads to more recent and persuasive mitigating evidence"); *Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective when he was aware of defendant's "extraordinary history of exposure to pesticides and toxic chemicals, yet he neither investigated fully this history nor informed the experts who examined [the defendant] of those facts"); *Illinois v. Morgan*, 719 N.E.2d at 705 (finding ineffectiveness when, "despite being aware of defendant's mental condition and brain damage, defense counsel failed to conduct an investigation into this relevant potential mitigation evidence"); *Pennsylvania v. Smith*, 675 A.2d at 1233-34

(ineffective assistance when "record reflect[ed that defendant] suffered some mental problems," yet counsel "neither pursued nor presented any evidence of mental state at the penalty phase"); *Goad v. Tennessee*, 938 S.W.2d at 370 (holding that counsel were ineffective for "fail[ing] to adequately investigate and explore mitigating evidence" when "[c]ounsel were aware that the evidence existed prior to trial").[9] Counsel's knowledge of the truncated life history presented in the social services records simply does not excuse counsel's failure to investigate. To the extent the Maryland courts relied on that theory, their decision was both contrary to, and an unreasonable application of, *Strickland*.

In this regard, the Maryland Court of Appeals committed – and the Fourth Circuit repeated – a grievous factual error in suggesting that the social services records revealed to Wiggins' lawyers the squalor and abuse to which Wiggins was subjected as a child. *See* Pet. App. 121a; *id.* 20a. The social services records have been lodged with the Court, and they speak for themselves. The plain fact is that they *do not contain* what the Maryland Court of Appeals and the Fourth Circuit claimed they did. The express findings of the state postconviction court – which neither the Maryland Court of Appeals nor the Fourth Circuit mentioned – make that explicit. *Id.* 142a n.269; JA 604-06; *see also* Pet. App. 54a n.16 ("[T]he Maryland Court of

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[9] *See also State ex rel. Busby v. Butler*, 538 So. 2d at 169 (vacating death sentence when "trial counsel conducted no investigation of mitigating evidence, despite having been told by [defendant] that he had been in numerous institutions"); *Hall v. Washington*, 106 F.3d at 749-50 (evidence "that the defendant has some mental or other condition that would likely qualify as a mitigating factor" necessitates investigation); *Hill v. Lockhart*, 28 F.3d at 845 (finding deficient performance where defendant had told counsel of hospitalizations for mental illness but counsel did not pursue information); *Jermyn v. Horn*, 266 F.3d at 306 (counsel ineffective for failing to investigate the circumstances of defendant's childhood when counsel knew defendant had claimed to have been abused as a child).

Appeals made the erroneous assumption that much of the critical information uncovered by the social history commissioned by post-conviction counsel had been contained in social service records available to trial counsel."). They make no mention of the miserable circumstances in which Wiggins spent the first six years of his life. They contain nothing about his being abandoned by his mother for days on end and forced to beg for food, nothing about the sexual abuse of his sister he witnessed, and nothing about the incident in which his mother forced his hands upon a hot stove, necessitating his hospitalization. Nor do the records contain any evidence of the sustained sexual predation to which he was subjected for years by his principal foster father, or the other instances of rape and abuse in other settings. Other than documenting the mitigating fact of Wiggins' borderline intelligence, the social services records barely scratch the surface of Wiggins' life history.[10] Thus, to the extent the Maryland Court of Appeals' ruling rests on this factual point, it is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," and cannot be upheld under the applicable standard of review. *See* 28 U.S.C. § 2254(d)(2), (e)(1).[11]

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[10] The State is well aware that the social services records do not contain the vast majority of Wiggins' relevant life history. At the postconviction hearing, counsel for the State sought to impeach the expert who prepared Wiggins' social history by pointing out that the social services records do not document the facts contained in the social history. JA 452.

[11] *Bell v. Cone*, 122 S. Ct. 1843, 1852 (2002), does not require a different result. In *Bell*, counsel had presented extensive testimony about Bell's past at the guilt phase, including testimony about the personality change Bell underwent after serving in Vietnam and his drug dependency. Counsel chose not to repeat this evidence at the sentencing phase because the jury had been instructed to consider evidence from both the guilt and punishment phases in making its determination as to whether a death sentence was warranted. *Id.* at 1848, 1853-54. In stark contrast, the jury

2. *Any "Tactical" Decision to Retry Guilt to the Exclusion of Developing and Presenting Mitigation Evidence Was Itself Ineffective Assistance of Counsel.*

Even apart from failing to develop the powerful mitigation case that was available, the performance of Wiggins' lawyers fell woefully short of "prevailing professional norms." *Strickland*, 466 U.S. at 688. The purported ground upon which the Maryland courts sought to justify counsel's performance was that they had made a reasonable tactical decision to "retry guilt" to the exclusion of a case in mitigation. The State elicited testimony from Schlaich, for example, that he thought it best to avoid a "shotgun" approach that might "confuse[] issues," Pet. App. 23a. As Judge Motz correctly determined, however, if counsel had possessed the mitigating information and had made the "tactical" choice not to present it, that decision would have been "virtually inexplicable." Pet. App. 55a. Indeed, upholding the Maryland Court of Appeals on this ground would be an objectively unreasonable application of *Strickland* for at least three reasons.

First, the realities of Maryland's capital sentencing procedure made it entirely unreasonable for Wiggins' lawyers to forgo developing a mitigation case. Applicable Maryland law provided that "[i]n any case in which the death penalty . . . is requested . . . a presentence investigation . . . shall be completed by the Division of Parole and Probation, and shall be considered by the court or jury before whom the separate

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that sentenced Wiggins never heard his compelling mitigation evidence. Moreover, counsel in *Bell* was aware of the other mitigation evidence, and thus could make a tactical choice about how best to use it. Wiggins' counsel, in contrast, had failed to conduct the requisite diligent investigation that would have allowed them to make a reasoned tactical decision regarding the presentation of mitigation evidence.

sentencing proceeding is conducted." Md. Ann. Code art. 41, § 4-609(d) (1988). Wiggins' July 1989 presentence report contained a brief description of his personal history and mental health status. His lawyers thus knew well in advance of sentencing that the jury would consider Wiggins' background and character no matter what they did, and that a focus on "retrying guilt" would result in Wiggins' life history being assessed solely on the basis of the presentence report.

A review of the presentence report vividly illustrates just how ineffective Wiggins' lawyers were in this regard. The report omits *all* of the powerful mitigation evidence contained in the social history submitted during the postconviction proceedings. The report also ignores even the mitigating aspects of Wiggins' character contained in records Wiggins' lawyers did possess (such as Wiggins' possible mental retardation). Even worse, Wiggins' childhood is painted in a highly unsympathetic light – the report quotes Wiggins as saying his childhood was "disgusting but he believes, somehow he will get it together" (JA 20) – and uses quotes from the presentence investigator's interview with one of Wiggins' sisters to cast doubt on even that vague and unhelpful description. JA 21 (quoting description by Wiggins' half-sister of the home where the sexual abuse occurred as "a nice home with a roof over our heads"). Had they been armed with the facts contained in Wiggins' social history, counsel could have countered the grossly misleading portrayal in the presentence report with the truth about his extreme suffering and deprivation. They could have educated the jury about the squalor of his natural mother's home and her cruelty towards him, and about the rampant sexual abuse he suffered at the hands of those the State chose to care for him.

It is not "the distorting effect[] of hindsight" to perceive this as a profound failure. *Strickland*, 466 U.S. at 689.

"[R]econstruct[ing] the circumstances of counsel's challenged conduct, and evaluat[ing] the conduct from counsel's perspective at the time," *id.*, Wiggins' lawyers had no basis for failing to develop mitigation evidence. Wiggins' lawyers knew at the time that the jury would be instructed to weigh aggravating evidence against mitigation evidence. They also knew that the jury would have the presentence report to consider as mitigation evidence. Keeping Wiggins' background out of the picture was simply not an option. Yet they did not even try to discover whether the facts of Wiggins' life history might be different – and more compellingly mitigating – than the version contained in the presentence report. As in *Williams v. Taylor*, "[t]he consequence of counsel's failure to conduct the requisite, diligent investigation into their client's troubling background and unique personal circumstances" was that the jury received a truncated and highly misleading version of Wiggins' life history. 529 U.S. at 415 (O'Connor, J., concurring).

Second, Wiggins' lawyers did not focus exclusively on "retrying guilt," and their conduct thus cannot be retroactively justified on that basis. The transcript of the sentencing hearing unambiguously establishes that Wiggins' lawyers did not focus exclusively on retrying guilt. To the contrary, counsel's opening statement told the jury that "you as sentencers consider not only the facts of the crime, what a person is found to have done, but also you must consider who that person is." JA 70. After summarizing the case against guilt, counsel promised the jurors that they were

> going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen. . . . I think that's an important thing for you to consider.

Id. 72.

But, after inviting the jury to consider "who [Wiggins] is," and without any suggestion that unforseen events caused counsel to reverse course, his lawyers offered literally *nothing* about Wiggins' "difficult life" that would serve to lessen his culpability. *See, e.g.*, *Ouber v. Guarino*, 293 F.3d 19, 27 (1st Cir. 2002) (where unforeseeable events did not require change in strategy, defense counsel's failure to follow through on promises in opening statement constituted ineffective assistance); *McAleese v. Mazurkiewicz*, 1 F.3d 159, 166 (3d Cir. 1993) ("The failure of counsel to produce evidence which he promised the jury during his opening statement that he would produce is indeed a damaging failure sufficient of itself to support a claim of ineffectiveness of counsel.").

Rather than present such evidence, Wiggins' lawyers offered "mitigation" evidence that was a poor substitute for Wiggins' compelling life history. The final defense witness was a criminology expert, Dr. Robert Johnson, who testified about violent offenders' prospects for successful adjustment to prison life. Dr. Johnson opined generally that prisoners serving life sentences for violent offenses tend to commit fewer infractions while incarcerated than do prisoners with shorter sentences. He testified that such prisoners are generally more successful at controlling violent impulses in a prison setting than they would be outside of prison. JA 311-13. He then testified that he had interviewed Wiggins, and believed Wiggins would "fit the generalization" because "he showed some of the patterns of settling into jail life." *Id.* 319-20. He reached this conclusion despite acknowledging (in testimony elicited by Schlaich) that Wiggins had several infractions while incarcerated, and had made "verbal threats." JA 318.[12]

[12] Dr. Johnson's testimony had no relevance to issues of Wiggins' guilt or principalship. It was relevant only to the ultimate weighing judgment the jury would make *after* concluding that Wiggins was a principal. Johnson's testimony assumed that Wiggins was a violent person whose aggressive tendencies could be controlled in a prison environment, and its sole purpose was to provide a reason to spare Wiggins on the assumption that he had killed Ms. Lacs.

Wiggins' lawyers thus managed to bring about the worst of all worlds. Schlaich's abortive presentation of mitigation evidence was precisely the sort of "shotgun approach" he testified he intended to avoid, yet he did not present the powerful mitigation case that was available. The reality is that Wiggins' lawyers lacked any reason – strategic or otherwise – for failing to develop and present the available powerful mitigation case. Whatever counsel subsequently claimed, what they actually did at sentencing was plainly unreasonable.

Third, Wiggins' lawyers acted unreasonably in concluding that mitigation evidence would be inconsistent with an effort to disprove principalship. As Judge Niemeyer stated, Wiggins' counsel "could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence." Pet. App. 25a. Far from conflicting with an effort to disprove principalship, as the district court observed, these facts could have been "mesh[ed]... into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder." *Id.* 55a n.17. Wiggins' marginal intelligence made him particularly susceptible to being manipulated by others. *See generally Atkins v. Virginia*, 122 S. Ct. 2242, 2250 (2002) ("[T]here is abundant evidence that . . . in group settings [mentally retarded persons] are followers rather than leaders."). Wiggins' social history similarly shows that he willingly concealed the sexual abuse inflicted by his foster father and Jobs Corps supervisor in order to maintain some semblance of

familial relationships in his life. Counsel could have argued a similar pattern here to suggest that Wiggins was merely covering for the Armstrongs.

Nor was there any danger that introducing mitigation evidence would have opened the door to evidence of prior convictions, violence, or suggestions of future dangerousness. Wiggins had no prior criminal record. *See* Pet. App. 55a ("The absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation of evidence about Wiggins's background would have been detrimental to him in terms of 'future dangerousness.'"). Indeed, given the lack of prior history of violence, the Fourth Circuit's contrary suggestion that mitigation evidence could have harmed Wiggins, *id.* 22a-23a, flouts *Williams* and renders meaningless this Court's repeated holdings that the Constitution requires that the jury receive information necessary for it to render a "reasoned moral response." If the mitigation evidence available in this case is "double-edged," then no defendant could ever successfully pursue an ineffectiveness claim for failure to present mitigation evidence.

Moreover, the course counsel actually pursued was so ill-conceived as to be ineffective under any circumstances. Wiggins' lawyers knew before the sentencing proceeding commenced that the jurors would be instructed that

> Kevin Wiggins has been convicted of murder in the first degree of Florence Lacs and the robbery of Florence Lacs. This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact.

JA 362; *see also* JA 492. In light of that unambiguous instruction, Wiggins' lawyers had no prospect of convincing the

jury that Wiggins was innocent of all involvement in Ms. Lacs' murder. Their only option was to contest "principalship."

To establish principalship in Maryland, and thus establish the defendant's eligibility for the death penalty, the prosecution must show the defendant is "the one who *actually* commit[ted] the crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *Pope v. Maryland*, 396 A.2d 1054, 1064-65 (Md. 1979) (emphasis added). Principalship is thus not about the defendant's innocence, but rather the degree of his personal moral culpability. *See generally Enmund v. Florida*, 458 U.S. 782 (1982). Accordingly, the defense available to Wiggins' lawyers was to acknowledge what the trial court's instructions made mandatory – that Wiggins was involved – but to contend that someone else was principally responsible for Ms. Lacs' death.[13] In other words, counsel needed to present an alternative hypothesis as to who might have been the principal.

Wiggins' counsel never made such an argument, even though (as the district court noted) it was readily available to them. Pet. App. 44a n.9. The trial record showed that Wiggins' girlfriend, Geraldine Armstrong, was with Wiggins when he was arrested in Ms. Lacs' car, and had been the one actually using the credit cards to make purchases on the evening of September 15th. Indeed, the prosecution depended on her self-serving testimony to establish that Wiggins arrived at her

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[13] The judge instructed the jury:

> [Y]our first task, as I said, is to determine in Section I of this form whether you are unanimously persuaded beyond a reasonable doubt that the defendant was a principal in the first degree to the murder of Florence Lacs. The defendant's conviction of first degree murder does not establish that he was a principal in the first degree. A principal in the first degree is one who actually committed the murder by his own hands.

JA 362-63.

home on the 15th in possession of Ms. Lacs' car and credit cards. Armstrong was originally arrested with Wiggins and charged with murder and robbery, but all charges against her were later dropped.[14] One of Armstrong's brothers lived directly below Ms. Lacs in the apartment complex. Another of Armstrong's brothers became involved in a violent argument with Wiggins at Armstrong's home at precisely the time she later contended Wiggins arrived with Ms. Lacs' car and credit cards on the evening of September 15th. These facts could well have supported an argument that one or more of the Armstrongs were principally responsible for the murder. But Wiggins' lawyers made no such argument. To the contrary, as the Maryland Court of Appeals noted, Wiggins' lawyers advanced no evidence or argument showing that someone else was principally responsible for the murder. *Wiggins v. Maryland*, 597 A.2d 1359, 1368 (Md. 1991).

Instead of offering a coherent factual narrative supporting the conclusion that Wiggins was merely an accomplice, Wiggins' counsel urged the jurors to reach the "stunning conclusion . . . that you can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the murder of Ms. Lacs," JA 391 (emphasis added). That was – and could only have been understood by the jury as – a plea for nullification. But "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see also Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Donnelly v. DeChristoforo*, 416 U.S. 637, 644 (1974). In contrast, "arguments of counsel generally carry less weight with a jury than do instructions from a court. The former are usually billed in advance to the jury as

[14] Although the trial record did not include this fact, Armstrong failed a state-administered polygraph examination, which indicated that she answered falsely when asked whether she had been in the victim's apartment and had participated in the murder. Mar. 29, 1994 Tr. at 103. Wiggins' lawyers possessed the polygraph report at the time of the sentencing hearing.

matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." *Boyde v. California*, 494 U.S. 370, 384 (1990). The instruction here was particularly likely to command the jury's obedience, because it involved not an arcane point of law but a fundamental fact: Wiggins had already been convicted of the murder beyond a reasonable doubt. Counsel's effort to have the jury disregard those instructions cannot be defended as a reasonable strategy. *Cf. Strickland*, 466 U.S. at 694-95 (applying "assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision"). That is particularly true given that the judge, not the jury, found guilt, and Wiggins' lawyers therefore could not play on any "lingering doubt" on the part of the sentencers.

Thus, for all these reasons, it was an unreasonable application of *Strickland* for the Maryland courts to conclude that Wiggins received the effective assistance of counsel to which the Sixth Amendment entitled him.

II. WIGGINS WAS PREJUDICED BY HIS COUNSEL'S PERFORMANCE.

In the Fourth Circuit, the State barely contested prejudice, and with good reason. Chief Judge Motz held – and the Fourth Circuit did not dispute – that because "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*," the conclusion that Wiggins was prejudiced by his counsel's deficient performance follows from *Williams* "*a fortiori*." Pet. App. 52a.

In *Williams*, this Court applied *Strickland*'s standard for assessing prejudice – petitioner must prove that there is a

"reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694 – and held that the Virginia Supreme Court had unreasonably concluded that Williams suffered no prejudice from his counsel's failure to prepare and present a case in mitigation. *Williams*, 529 U.S. at 391, 396-97.

Trial counsel in *Williams* had failed to discover and present to the jury important mitigating evidence, including that "Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration . . . and then, after his parents had been released from prison, had been returned to his parents' custody." 529 U.S. at 395 (footnote omitted). Counsel had also failed to introduce evidence that Williams was "borderline mentally retarded," and had failed to discover prison records that contained "commendations" Williams had received in prison, as well as positive testimony from a member of a prison ministry program.

Although the mitigation evidence left undiscovered in *Williams* was substantial, so too was the prosecution's evidence supporting the death sentence. In particular, Williams, prior to the murder for which he had been sentenced to death, "savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw." 529 U.S. at 418 (Rehnquist, C.J., dissenting) (internal quotation marks and citation omitted). Moreover, even the evidence trial counsel had failed to discover was not uniformly helpful, because it included Williams' substantial juvenile criminal record. *See* 529 U.S. at 396.

Yet despite Williams' acknowledged history of serious criminal violence, and despite the fact that some of the evidence omitted by counsel would have been damaging to Williams, this Court held that the mitigation evidence counsel had failed to investigate, discover, and present to the jury "might well have influenced the jury's appraisal of his moral culpability," *id.* at 398 (quoting *Boyde v. California*, 494 U.S. at 387). Accordingly, this Court held that counsel's deficient performance had prejudiced Williams.

The conclusion that Wiggins was prejudiced by his counsel's failures at the sentencing stage follows inevitably from *Williams*. The mitigation evidence that competent trial counsel would have discovered was even more compelling than the evidence left undiscovered in *Williams*. The jury that sentenced Wiggins to death never learned that Wiggins and his siblings were routinely left alone and unfed for days at a time; that Wiggins witnessed one of his sisters routinely being sexually abused by a boyfriend of his mother; that Wiggins was physically abused by his first foster family and, from the age of eight on, was sexually abused for many years by his second foster father; that Wiggins was raped by the teenaged sons of his fourth foster family; and that Wiggins was molested by his Job Corps supervisor. Pet. App. 54a-55a (internal citations omitted); *see supra* pages 8-9.

Nor did the jury know (as the social services records indicated) that "Wiggins possessed 'borderline intelligence' and in fact may have been mentally retarded." Pet. App. 53a n.15. The failure to introduce that evidence was particularly harmful because this Court had just held that mental retardation was a mitigator to be considered in capital cases, *see Penry v. Lynaugh*, 492 U.S. 302, and, just weeks before Wiggins went to trial, the Maryland legislature passed a statute forbidding the execution of the mentally retarded, Pet. App. 53a n.15.

In short, like Williams, Wiggins suffered severe physical abuse as a child and was at least borderline mentally retarded. But Wiggins' witnessing of the routine sexual abuse of his sister and the repeated sexual abuse and rape to which Wiggins himself was subjected in his foster homes left Wiggins' childhood marked by a degree of suffering beyond even that which characterized Williams' "nightmarish childhood." Had Wiggins' trial counsel been competent, they would have had available mitigation evidence that was far more compelling than that available to counsel in *Williams*.

Moreover, the prosecution's case in aggravation was indisputably weaker than in *Williams*. In *Williams*, the State demonstrated that Williams "had engaged in a life-long crime spree," and it presented "strong evidence that [Williams] would continue to be a danger to society, both in and out of prison." *Williams*, 529 U.S. at 419 (Rehnquist, C.J., dissenting). In stark contrast, in Wiggins' sentencing hearing, the prosecution introduced *no* evidence (apart from the underlying facts of the crime) to support the death sentence in Wiggins' case. The sole aggravator the State sought to prove was that the murder was committed in the course of a robbery.

In further contrast to *Williams*, Wiggins had no previous convictions or other history of violence that would have become available to the prosecution. The State stipulated accurately that Wiggins had no convictions for crimes of violence; indeed, Wiggins had no prior convictions at all. There was thus substantially less concern for Wiggins than there was for Williams that the new evidence might reinforce the State's argument that the defendant should be put to death.

Finally, the prejudice to Wiggins is even more stark because the available mitigation evidence would have dramatically reinforced the principalship defense that counsel purported to mount. Counsel would have been able to

incorporate the mitigation evidence regarding Wiggins' vulnerability and possible mental retardation into "an effective argument that Wiggins had been made a pawn of others who were responsible for the murder," Pet. App. 55a n.17, making it less likely that Wiggins was the "principal."

The consequence of counsel's failure to present either Wiggins' compelling family and social history or the ample evidence of his diminished capacity cannot be overstated. Under Maryland law, if only one juror believes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed. *See, e.g., Borchardt v. Maryland*, 786 A.2d 631, 660 (Md. 2001). Moreover, it is well-established that jurors need not agree unanimously on particular mitigation evidence to give it effect. *See Mills v. Maryland*, 486 U.S. at 400; *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990). In light of the powerful mitigation evidence that the jury never heard and the weakness of the prosecution's aggravation case, there is at a bare minimum a "reasonable probability" that at least one of the twelve jurors would have concluded that the mitigation evidence outweighed the slight aggravating evidence, and that a punishment of death was impermissible.[15] Indeed, the jury's knowledge of Wiggins' horrific childhood and marginal intelligence would likely have made a difference to all the jurors faced with the decision on Wiggins' sentence.

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[15] Both before and after *Williams*, the courts of appeals have routinely found prejudice in cases involving inadequate mitigation investigations even when the mitigating evidence was less compelling and the aggravating evidence more compelling than the evidence at issue here. *See, e.g., Lockett v. Anderson*, 230 F.3d at 713-16; *Brownlee v. Haley*, 306 F.3d 1043, 1070 (11th Cir. 2002); *Collier v. Turpin*, 177 F.3d 1184, 1202-03 (11th Cir. 1999); *Battenfield v. Gibson*, 236 F.3d at 1235; *Emerson v. Gramley*, 91 F.3d at 906-07; *Jermyn v. Horn*, 266 F.3d at 309-12; *Carter v. Bell*, 218 F.3d 581, 599-600 (6th Cir. 2000); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995)

In short, even more so than in *Williams*, an analysis of "the totality of the omitted mitigation evidence," including Wiggins' upbringing and limited mental capacity, "might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Accordingly, Wiggins' death sentence must be vacated.[16]

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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[16] This Court's decision in *Woodford v. Visciotti*, 123 S. Ct. 357 (2002) (per curiam), is not to the contrary. First, the mitigating evidence at issue there – that Visciotti had been "berated" as a child; he lacked "self-esteem"; he had feelings of "inadequacy, incompetence, inferiority"; and he had "moved '20 times' while growing up," *id.* at 361 – is of a different order of magnitude than the evidence here. Second, the aggravating evidence at issue in *Visciotti* was substantially more egregious, and included prior violent offenses, such as "the knifing of one man and the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby." *Id.*

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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
for the Fourth Circuit

BRIEF FOR RESPONDENTS

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CAPITAL CASE

QUESTION PRESENTED

As allowed by Maryland's death penalty statute, Wiggins waived his right to a jury trial, but not to a jury sentencing. At sentencing, the jury first had to determine, unanimously and beyond a reasonable doubt, whether Wiggins was a first degree principal in the victim's murder. Had it not been persuaded of Wiggins's first degree principalship, the sentencing jury never would have reached the further questions whether aggravating and mitigating circumstances had been proven. Nor would the jury have engaged in the weighing of aggravating and mitigating circumstances to determine whether death was an appropriate sentence. The question presented is:

Where counsel had obtained records and information reflecting that Wiggins, who steadfastly maintained his innocence of all crimes except possession of stolen property, had psychological problems and had been neglected as a child and physically and sexually abused, did the Maryland Court of Appeals not unreasonably apply *Strickland v. Washington* in determining that counsel, in a case comprised entirely of circumstantial evidence, made a deliberate, tactical choice not to present evidence at sentencing that could explain why Wiggins murdered the victim and to present instead a case for why Wiggins was not a first degree principal in the murder?

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STATUTORY PROVISIONS INVOLVED

Maryland's death penalty statute, as in effect when Wiggins was sentenced, Md. Code Ann., Art. 27, § 413 (1987 Repl. Vol. & 1989 Cum. Supp.), is reproduced as an appendix to this brief at App. 1a-8a, together with Maryland Rule 4-343 (1989) at App. 8a-20a, which sets out the jury sentencing form in use at the time of sentencing in Wiggins's case.

PRELIMINARY STATEMENT

Wiggins proceeds in this Court as though he were attacking a state court decision on direct review prior in time to this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). Wiggins's case is a habeas case, subject to the restrictions that Congress placed on the power of federal courts to grant writs of habeas corpus to state prisoners when it enacted the Antiterrorism and Effective Death Penalty Act of 1996. Wiggins's portrait of inexperienced, incompetent trial attorneys who went down a doomed path due to lack of investigation and an inept choice of sentencing tactics is inaccurate. When the actions of Wiggins's attorneys are viewed fairly and with the deference owed them under *Strickland*, and not through the distorted prism of hindsight, a far different picture emerges.

From the outset, Wiggins's trial team of two attorneys, one with eight years of trial experience in over 800 felony cases (including a previous capital case) and the other with four years of experience (including appellate work on death penalty cases), conducted a thorough investigation and designed a comprehensive litigation strategy. Although the evidence was undisputed that Wiggins had been seen talking with the victim on the day of her murder and was in possession of her car and credit cards that same day, the evidence against Wiggins was entirely circumstantial. This being the case, counsel focused on reasonable doubt, following a course of action, for both trial and sentencing, calculated to avoid a first degree murder conviction, to avoid findings that Wiggins was a first degree principal and death eligible, and to avoid a sentence of death.

Counsel did not pursue that strategy blindly. Contrary to Wiggins's repeated assertions, counsel knew, and in fact so stated in response to questioning by Wiggins's counsel during state post conviction proceedings, that Wiggins had been neglected and abused by his mother, subjected to sexual and physical abuse while growing up, and was of limited intelligence. Trial counsel knew that Wiggins's background could be introduced as mitigating evidence at sentencing. Indeed, in a prior capital case, lead counsel had put on just such evidence at a sentencing proceeding that resulted in a death sentence. Trial counsel also knew that such evidence was double-edged, particularly where, as here, Wiggins's background had made him aggressive and hostile–just the kind of person who to a juror's mind would be capable of drowning an elderly woman. Thus, trial counsel made a reasonable tactical decision not to use evidence regarding Wiggins's background at sentencing, choosing instead to pursue a defense consistent with Wiggins's steadfast claim of innocence.

By adhering to a theory of innocence and not injecting abject social history that would entail a concession of guilt, trial counsel could persist in challenging principalship and the existence of the State's aggravator, i.e., that Wiggins committed a murder during the course of a robbery. If just one juror harbored reasonable doubt on either issue, Wiggins would not have been eligible for the death penalty. Furthermore, Wiggins's counsel knew that if the sentencing jury progressed beyond the issue of death eligibility, it would still have to engage in a weighing process because there existed the undisputed mitigating circumstance that Wiggins had no prior convictions for crimes of violence. By maintaining a theory of innocence, and not placing before the jury evidence that could also suggest possible future dangerousness, counsel had a potent residual doubt defense, which often sways a jury to find in favor of a life sentence.

Viewing counsel's performance in the light of *Strickland*, the Maryland Court of Appeals found that Wiggins's trial team

acted competently. The state court found as a fact that counsel knew of Wiggins's unfortunate childhood, but strategically chose not to present evidence of it to the sentencing jury. The state court ruled that counsel satisfied the performance prong as measured by *Strickland v. Washington*. That ruling is not an unreasonable application of *Strickland* and its progeny, and so there is no authority under 28 U.S.C. § 2254(d) to grant federal habeas relief to Wiggins.

STATEMENT OF THE CASE

A. Circumstances Surrounding the Victim's Death

Seventy-six-year-old Florence Lacs was found dead in the bathtub of her apartment at approximately 3:50 p.m. on Saturday, September 17, 1988. Pet. App. 94a-95a; JA 153-60, 206-07. But for underpants and footwear, Mrs. Lacs was fully clothed in the outfit she had worn to a luncheon on Thursday, September 15. JA 72-74, 155-56. The water in the tub in which Mrs. Lacs was found contained an active ingredient of Black Flag Ant and Roach Killer. JA 205.

Mrs. Lacs's apartment, located at the Clark Manor Apartments in Woodlawn, Maryland, showed no signs of forced entry. Br. in Opp App. 3a; JA 141-42, 148. The apartment had been ransacked, e.g., drawers had been removed from their original locations and their contents left in disarray; the mattress of Mrs. Lacs's bed was sitting askew of the box spring and the pillowcases were missing. Pet. App. 95a; Br. in Opp. App. 3a-4a; JA 148-53. Five unidentified fingerprints, and a baseball-type cap that police were unable to tie to Wiggins, were found inside Mrs. Lacs's apartment. JA 117-29, 144, 194-95.[1]

---

[1] In October of 2000, at the request of Wiggins's current counsel, Letter (10/4/2000) to Baltimore County Police Chief Terrance B. Sheridan, the five unidentified prints were compared to known prints of four of Geraldine Armstrong's relatives, including two of her brothers, with negative results, Letter (10/23/2000) from Assistant State's Attorney S. Ann Brobst.

On a coffee table in Mrs. Lacs's living room were two TV Guides. JA 146. The September 17 to 23 guide was unopened. JA 150-51. The September 10 to 16 guide had a bookmark inserted at the page displaying programs for September 15, and there were "markings" next to programs on the dates preceding the 15th. JA 146-47.

Wiggins, who was then living in his car, was hired to work at the Clark Manor Apartments on Wednesday, September 14, 1988. JA 93, 253-55. On the 15th, Wiggins worked with Robert and Joseph Weinberg, "touching up" an apartment before new tenants moved in. JA 253-55. Sometime on the 15th, Mrs. Lacs called down from her apartment to Wiggins and Robert Weinberg to inquire whether their truck was blocking her car. JA 256.

Wiggins was released from work on September 15th "[a]bout 4:45 [p.m.] or so." JA 258. Around 5:00 or 5:30, Chianti Thomas saw Wiggins outside Mrs. Lacs's apartment and heard him talking to Mrs. Lacs about sheetrock. Pet. App. 96a; JA 76-81. Approximately twenty minutes after he was released from work, Wiggins sought out Robert Weinberg and told him he had moved some sheetrock, a task that Weinberg had not asked Wiggins to do. JA 258-59.

Wiggins arrived at his girlfriend Geraldine Armstrong's apartment between 7:30 and 7:45 p.m. on the evening of September 15. JA 95. He was driving Mrs. Lacs's car. JA 95. After arguing with Armstrong's brother about use of water to wash up, Wiggins and Armstrong went to a nearby shopping mall, where they bought items for themselves using Mrs. Lacs's charge cards. JA 95-99, 110-14, 184-85, 208-12; Ex 3:197-200.[2] Wiggins told Armstrong that the cards belonged

[2] "Ex" refers to exhibits Respondents filed in federal district court pursuant to Habeas Rule 5; "R" refers to the record before the Court of Appeals of Maryland when that court affirmed the denial of post conviction relief; and "LM" refers to the materials that Wiggins has lodged in this Court.

to an aunt. JA 97. Although Wiggins himself presented the cards at the time of purchase, Armstrong signed the charge slips. JA 184-85.

Wiggins and Armstrong used Mrs. Lacs's charge cards to buy additional items on Friday, September 16th. JA 111-14, 208-12. On Saturday, Wiggins and Armstrong pawned, for between $30 and $50, a diamond ring that Mrs. Lacs customarily kept in her jewelry box. JA 91-92, 106, 197-99. Wiggins was arrested late on Wednesday, September 21, while driving Mrs. Lacs's car. JA 200-02. With Wiggins were Geraldine Armstrong and a small child. JA 201. As he was approached, Wiggins said: "[S]he didn't have anything to do with this." JA 202.[3]

In a written statement after arrest, Wiggins said he had found Mrs. Lacs's car around 1:00 p.m. the previous Friday. JA 179-86. He claimed the car was in the parking lot of a Roy Rogers restaurant with the driver's side window down and the keys in the ignition. JA 179-80. Wiggins further claimed to have found charge cards in a bag and a ring among some trash on the floor. JA 180, 185.

[3] Although arrested at that time and charged with murder, Ms. Armstrong was not indicted for crimes against Mrs. Lacs. Pet. App. 127a. Despite repeated suggestions by Wiggins that the prosecution made a deal with Armstrong for her testimony at Wiggins's trial, the state courts have expressly found the absence of a deal. Pet. App. 127a.

In federal district court, Wiggins contended for the first time that Armstrong made a deal to protect her brothers, one of whom Wiggins says, Pet. Br. 3, 44, lived in an apartment directly below the victim at the time of her murder. Ms. Armstrong never testified that her brother lived below Mrs. Lacs at the time of the murder. At trial Armstrong acknowledged that a brother "had" lived at the Clark Manor Apartments, that Wiggins had stayed with that brother, and that it may have been a year before the murder when Wiggins did so. Ex 3:201-08. At sentencing Armstrong testified that Wiggins lived with her brother at the Clark Manor Apartments during June or July of 1988. JA 93-94.

B. Wiggins's Trial

By indictment filed in the Circuit Court for Baltimore County in October, 1988, Wiggins was charged with murder and other crimes. JA 1. For the murder, the State sought the death penalty. JA 1.

Assistant Public Defenders Carl Schlaich and Michelle Nethercott represented Wiggins at trial and sentencing. JA 471-73, 513-14.[4] Lead counsel Mr. Schlaich was a law clerk at the Office of the Public Defender when he was admitted to the bar in 1981, and afterwards he worked as a panel attorney for that office until hired full time as an administrative assistant to the director of Patuxent Institution, JA 472, an institution within the Maryland Department of Public Safety and Correctional Services that was then charged with rehabilitating, by means other than incarceration, persons under sentence of imprisonment who had intellectual deficiencies or were emotionally unbalanced, Md. Code Ann., Art. 31B, §§ 1-2 (1983 Repl. Vol.). Mr. Schlaich was hired as a full-time public defender in Baltimore County in October of 1984. JA 472. He thereafter handled two hundred or more felony cases a year. JA 499. Before representing Wiggins, Mr. Schlaich had been lead counsel for Al Wayne Doering, also a capital defendant in a Baltimore County case, JA 473-75, and he had represented another defendant whose case "was a potential death qualified

[4] Maryland by statute has a statewide public defender system, the Office of the Public Defender of Maryland (OPD), through which indigent defendants in criminal cases are provided legal representation and other expert resources. Md. Code Ann., Art. 27A, §§ 1-14 (1997 Repl. Vol. & 2002 Supp.). OPD has a "specialized Capital Defense Division that provides support services and legal assistance to both local Public Defenders and panel attorneys." *The Report of The Governor's Commission on the Death Penalty-An Analysis of Capital Punishment in Maryland: 1978 to 1993* at 192 (1993). The cited report makes thirteen findings, the sixth being that "[t]he Maryland Public Defender provides excellent and thorough legal representation to defendants in capital cases. That role is essential to the legitimacy of the death penalty." *Id.*

case," JA 474. Ms. Nethercott joined the bar in 1985, and began working as a public defender in January of 1988. JA 513. Ms. Nethercott had not previously tried a capital case, but had worked on capital appeals in South Carolina doing legal research. JA 513-14.

Ms. Nethercott did "a lot of legal research" in Wiggins's case, JA 515, and she prepared most of the pleadings, with Mr. Schlaich serving as editor, JA 477-78, 515. In one of its many pretrial motions, the defense urged that the State be required to make a prima facie showing of sufficient evidence to support the aggravating circumstance it intended to rely on in seeking the death penalty. JA 8-16. Counsel wanted to circumvent Wiggins's being tried by a death-qualified jury, which they believed would be more prone to convict, should Wiggins not waive a jury for trial. JA 8-16.

Wiggins's motion was denied, JA 16, and he waived his right to a jury trial at the guilt/innocence phase, saying: "My decision is to go with a judge because I have the death penalty over my head, and I feel as though the people that agree to the death penalty are more likely to go with the State, and I feel as though, you know, that's a prejudice in that area." JA 26. In testimony at Wiggins's post conviction hearing, Mr. Schlaich explained that in his experience Baltimore County juries were "extremely conservative" and "very bent towards guilt." JA 500. He believed that Judge J. William Hinkel, the assigned trial judge, would be able to look past the grisly circumstances of the crime and "look at the reasonable doubt question and make a decision, solid, intellectual decision." JA 500.

The evidence adduced at Wiggins's trial, which occurred in early August of 1989, JA 1, was well summarized by the Maryland Court of Appeals on direct review. Br. in Opp. App. 2a-9a. Based on this evidence, Judge Hinkel found Wiggins guilty of murder, robbery, and two counts of theft. JA 28-32. Judge Hinkel concluded that the victim's death "had to occur sometime after the defendant finished work on Thursday [and] the time he appeared with the automobile and credit card at the

home of Geraldine Armstrong." JA 31. As Judge Hinkel concluded his findings, Wiggins interrupted the statement of the verdict, asserting: "He can't tell me I did it. I'm going to go out. . . . I didn't do it. He can't tell me I did it." JA 32.

Immediately after verdict, Mr. Schlaich requested that sentencing be delayed until September or later, saying: "There are many things to do, including the examination of Mr. Wiggins by various experts and notifying the State of those expert opinions as well as concluding various statistical studies." JA 33. The court granted counsel's request as "reasonably necessary." JA 33.

C. Wiggins's Sentencing

Sentencing in Wiggins's case occurred in October of 1989, more than two months after trial concluded. JA 2. In a Supplemental Answer to State's Discovery Request filed on September 18, 1989, the defense advised that it intended to call William Stejskal, Ph.D., as an expert in psychology, and that Dr. Stejskal was of the opinion that Wiggins suffered from a mental disorder and had an I.Q. of 79. R 440-41. The bases for Dr. Stejskal's opinions included clinical interviews of Wiggins, Department of Social Services (DSS) records,[5] transcripts of interviews by Public Defender investigators with family members, and psychological tests. R 440-41.

Among the many defense motions that Judge Hinkel entertained immediately before sentencing, JA 43-52, was one to bifurcate the proceeding, so that the issues of principalship and aggravators would be decided before the jury heard any

[5] Wiggins has lodged with this Court the DSS records that defense counsel obtained pursuant to court order dated February 22, 1989, requiring the Baltimore City Department of Social Services to "honor the Defendant's subpoena and immediately provide" Carl Schlaich and Michele Nethercott "a copy of the entire departmental file regarding allegations of abuse against Kevin Wiggins." LM 1. The records, which consist of more than 200 pages of materials, include DSS documents and caseworker reports, as well as medical and school records. LM 2-219.

evidence relating to mitigation. JA 34-42. In support, Ms. Nethercott argued that in the absence of a bifurcated sentencing proceeding the State would be able to introduce evidence, such as the presentence investigation report (PSI), that was both irrelevant to the issues of principalship and the existence of the aggravating circumstance and prejudicial to Wiggins. JA 44. Ms. Nethercott continued:

> To be very specific about it, Your Honor, in this case I can proffer to the Court that, in a non-bifurcated proceeding, the defense is in a position of coming forward with evidence regarding psychological history on Mr. Wiggins, including aspects of his life history, including a diagnosis of a personality disorder, including diagnosis of some retardation.
>
> The problem, Your Honor, is that all of that evidence which is relevant to mitigation in both a statutory and non-statutory sense is not relevant at all on the issue of principalship. And the danger is, if the jury hears all of this, that they're going to use that evidence in coming to a conclusion with respect to principalship and coming to a conclusion with respect to proof on the aggravating factor.

JA 44-45. Judge Hinkel denied Wiggins's request. Br. in Opp. App. 24a-26a.

Wiggins elected to be sentenced by a jury, and although prospective jurors were told that Wiggins had been found guilty of murdering Mrs. Lacs, extensive voir dire was conducted to ensure that selected jurors would punish Wiggins based only on the law and the evidence presented to them. JA 53-54; Ex 8:12-298. As early as the prosecutor's opening statement, Wiggins made it clear to the jurors that he disputed the State's theory that he had killed Mrs. Lacs. In an outburst reminiscent of that which had occurred during rendition of Judge Hinkel's verdict, Wiggins threatened: "I'm not going to take that because I didn't kill that lady. I am not going to sit there and take that. I didn't kill that lady. I am not going to sit there and take that." JA 56.

Defense counsel, too, in opening statement disputed the notion that the State's evidence would prove principalship. JA 70-71. Counsel also relied on the fact of Wiggins's murder conviction to Wiggins's advantage, saying that, as a consequence, Wiggins "will be punished harshly and immediately." JA 68. And counsel, consistent with what Wiggins would later say in allocution, advised that the jury would hear that life had not been easy for Wiggins. JA 72.

The evidence presented by the State at sentencing to prove Wiggins's guilt and principalship was, for the most part, similar to that introduced at trial. JA 55-408. There were some differences. Br. in Opp. App. 10a-11a. For its part, the defense called Dr. Silvia Camparini, a different expert pathologist than the one they had called at trial, and Dr. Camparini gave an opinion regarding time of death that was at odds with the State's theory that the victim had been killed on Thursday, September 15. JA 271-90.

In addition to Dr. Camparini, the defense called Dr. Robert Johnson, Professor of Justice, Law and Society at American University, JA 306, "as an expert in criminal justice with a speciality in social-psychological adjustment of people serving a life sentence," JA 311. One of the exhibits introduced by the State at sentencing was the PSI prepared by the Division of Parole and Probation. JA 17-24. One section of the PSI dealt with Wiggins's institutional history following his arrest for Mrs. Lacs's murder, revealing, among other things, that Wiggins had been charged with being verbally abusive on two occasions. JA 20. Dr. Johnson acknowledged Wiggins's rule violations, JA 318, saying that Wiggins, who had never before been in jail, had been depressed and very upset when first incarcerated, and that the "initial adjustment was extremely difficult," JA 320. In subsequent conversations with Dr. Johnson, Wiggins had "indicated that he felt that he was gradually learning to bend to the rules of the prison." JA 320. Dr. Johnson opined that Wiggins would adjust decently to prison under a life sentence. JA 319-21.

Before the conclusion of the defense's case at sentencing, Mr. Schlaich revisited the issue of bifurcation, saying:

> Your Honor, what we have is that, because of the Court's ruling denying bifurcation of the sentencing phase of this hearing, and based on our argument that to present evidence of Mr. Wiggins' psychological profile during a non-bifurcated proceeding would prejudice the jury's decision as to whether Mr. Wiggins was the principal in the first degree in this offense, we feel that we are prejudiced in such a way that we are precluded from presenting our last witness, who would be, would have been Dr. William [Stejskal]. And therefore, we would not be offering him to the jury live.

JA 348. Mr. Schlaich then proffered that if called to testify Dr. Stejskal, a psychologist who had seen Wiggins on two occasions and conducted numerous psychological tests, would say that Wiggins "is very childlike"; shows "a lack of intellectual development"; "feels ineffective and overmatched by life"; and "has a full scale IQ of 79." JA 349. Mr. Schlaich continued:

> The doctor would testify that an IQ of 79 impairs a person's function in every aspect of daily life that requires problem solving, that it makes those people poor social judges of other people, that it makes people poor judges of decisionmaking in general, that it makes them anxious and confused in demanding situations but, however, at an IQ level of 79, you are bright enough to know that you do more poorly at problem solving than others do and therefore that makes you emotionally vulnerable to what you expect to be an oncoming attack.
>
> He suffers from no brain damage. The doctor will testify that he scored low on the antisocial scale, that he's not impulse ridden, that he is not narcissistic; however, the defendant, the defendant's tests results indicate that he is the type of person who will occasionally take what he thinks he is entitled to.

Furthermore, Your Honor, the results would indicate that he has difficulty coping, but those difficulties are not due to any presence of a psychotic disorder. He's not self-centered or narcissistic. He's aware of his limits. He's interested in other people. He has some capacity for empathy with other people. He wants to function in the world.

The doctor found him to be void of what he classifies as the malignant fluff, which means he sees no aggressive pattern in his behavior and no acted-out hostility. However, he would note that Mr. Wiggins is full of bluster and likes to mouth off and did, in fact, engage in a session of that with the doctor.

He would furthermore state that he feels that he would adapt to prison. However, he will be a very verbal and loud-mouthed prisoner for some time but not physically aggressive.

He would state that it is his opinion that the defendant currently has a psychiatric/psychological diagnosis of personality disorder NOS, which means not of specific type, and that it has features of borderline paranoid personality.

JA 350-51.

After Mr. Schlaich's proffer, the court confirmed: "And you understand that I'm not barring you from offering that testimony but it's in your judgment from a trial strategy that it would be prejudicial to the defendant because of the denial to bifurcate the proceeding; is that correctly stated?" JA 351. Mr. Schlaich replied: "Exactly, Your Honor. I understand you're not barring it but that's a correct restatement of our position on it, Your Honor." JA 351.

Following this discussion about Dr. Stejskal's not being called to testify, counsel turned to the issue of whether Wiggins would testify. JA 352-55. During questioning of Wiggins concerning his election in this regard, Wiggins, after acknowledging that he had no prior criminal convictions that

could be used against him, JA 353, said:

> But let me just say something. I mean, everybody doing every damn–think I have one right to say one thing. I don't have anything to hide, okay. And I don't care what anybody thinks, all right. I know that I didn't kill, but–can I explain to him why? Okay.

JA 353-54. After speaking with counsel, Wiggins decided not to say anything more to the judge, and he waived his right to testify. JA 354.

The sentencing jury was instructed that, by agreement of the parties, the mitigating circumstance–that the defendant has not previously been found guilty of a crime of violence–existed and had been premarked proven on the jury sentencing form. JA 366-67. The sentencing jury was also instructed that Wiggins had been convicted of murder, JA 362, but that "[t]he defendant's conviction of first degree murder does not establish that he was a principal in the first degree." JA 363. And the jury was admonished that "[a] principal in the first degree is one who actually committed the murder by his own hands"; that "[t]he State has the burden of persuading you beyond a reasonable doubt that the defendant was a principal in the first degree to the murder"; and that "[t]he defendant is not required to persuade you that he was not a principal in the first degree." JA 363.

In closing argument, Mr. Schlaich vigorously disputed Wiggins's principalship, saying:

> The fingerprints left behind in Ms. Lacs' apartments are the killers. That's why they're there, and in particular, the fingerprints that are on that soap box. You see the pictures. You see how things have been moved around. You see in those pictures the cleaning supplies pulled out of the closet, placed on the floor, things stacked on the table. One of the things stacked on the table is the soap box the fingerprints came off of.
>
> Who touched it? Who moved it? The killer did. And that fingerprint is not Kevin's. What do these pieces of

evidence lead you to conclude? That Kevin Wiggins did not murder Ms. Lacs to acquire her property.

This conclusion can be reinforced with some other things you should consider. There is Black Flag in the water. Let's assume that it is there because it was sprayed on Ms. Lacs' body like the State tells you.

In their opening and again in their closing, they pointed out to you how bizarre that was. What reason for that is there? It is sick. They ask you, is there anything that you know from this evidence about Kevin Wiggins that leads you to conclude he is a bizarre person like that? Read that pretrial investigation that the State put into evidence. There is not one thing in there that would lead you to conclude that Kevin Wiggins is this kind of a person.

Second, is there any reason to believe that a twenty-seven year old man with no prior record, not only no prior record of a crime of violence, but no prior record at all, nothing, who tries to work, who tries to keep a place to live, would start his criminal career by murdering an elderly woman for her orangish Chevette and her credit cards? The answer to that is no.

JA 396-97.

Under Maryland law, *Thanos v. State*, 330 Md. 77, 87-90, 622 A.2d 727, 732-33 (1993), the choice to allocute at sentencing was personal to Wiggins. Wiggins elected to exercise that right and in doing so emphatically denied culpability for Mrs. Lacs's murder, saying:

> Ladies and gentlemen of the jury, it has been hard for me to know what to say to you. I don't know how to plead for my life.
>
> I am sorry about what happened to Ms. Lacs and I feel for her and her family. But I did not kill her. I should not have used the things that did not belong to me because I know that was wrong, and I am ready to go to jail for that.
>
> I am so upset right now about what is happening. I

> don't know if they were right about this, my lawyers, wanted me to get up and speak, but I've been going through a lot at the Detention Center, and I'm just really upset.
>
> But I do say this. I did not murder Ms. Lacs. I can't believe that the State wants you to give me the death penalty. And they laugh about it in the courtroom. It makes me feel like my life means nothing.
>
> I am not a troublemaker, and I don't hurt people, and have no convictions. I have tried to keep a job and a place to live, but that has not been easy for me because I haven't finished school. And everywhere I go they ask for a degree in this and a degree in that, and I don't have it. And I had to come out of school because I had to support myself because my mother left me on the doorstep.
>
> I would just like to thank you for listening to me, and I would like to thank Carl Schlaich and Michele Nethercott for respecting me and believing me, and hanging in there with me because I have been given a hard time because I've been going through a lot. Thank you.

JA 407-08.[6]

As required by Maryland law in order to impose a sentence of death, Md. Code Ann., Art. 27, § 413; Md. Rule 4-343; App. 9a, the jury first unanimously found beyond a reasonable doubt that Wiggins was a principal in the first degree to the murder of Mrs. Lacs. JA 408. Only then did the jury go on to find, again unanimously and beyond a reasonable doubt, that Wiggins had

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[6] Wiggins's remarks in allocution fulfilled his counsel's prediction in opening statement that "[y]ou're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period." JA 72. Wiggins's comments were consistent with the PSI, which, aside from describing Wiggins's institutional history following arrest, did little more than provide a glimpse, from Wiggins's perspective, of his personal, educational, employment, and health history. JA 17-24.

committed the murder in the course of robbing or attempting to rob the victim. JA 409-10. Per the parties' stipulation and the court's instruction, the statutory mitigating circumstance that Wiggins had not been previously convicted of a crime of violence was deemed proven. JA 367. One or more, but fewer than twelve, jurors found an additional mitigating circumstance, i.e., Wiggins's "background." JA 409. Because at least one mitigating circumstance had been proven, Wiggins's jury was required to engage in a weighing process. Md. Code Ann., Art. 27, § 413(h). The jury sentenced Wiggins to death upon finding that the aggravating circumstance outweighed mitigating circumstances. JA 409-10.

In November, 1991, Maryland's high court affirmed all but Wiggins's theft convictions. Br. in Opp. App. 1a-38a. Two judges dissented from the affirmance of Wiggins's death sentence, finding the evidence sufficient to convict Wiggins of murder, but insufficient to establish that Wiggins was a principal in the first degree in that murder. *Id.* 32a-38a. The dissenting judges "would [have] vacate[d] the death sentence and remand[ed] for the imposition of a life sentence." *Id.* 38a. This Court subsequently denied Wiggins's petition for certiorari. *Wiggins v. Maryland*, 503 U.S. 1007 (1992) (order).

D. Wiggins's State Post Conviction Proceedings

In January, 1993, Wiggins initiated state post conviction proceedings in the Circuit Court for Baltimore County. JA 2. Pursuant to Maryland law, Md. Code Ann., Art. 27, § 645A(f) (1992 Repl. Vol.), Wiggins was represented by counsel. Wiggins raised more than fifty claims, including claims that counsel failed to introduce evidence showing that Wiggins was mentally ill, mentally retarded, homeless, and the victim of a horrible childhood, and that counsel failed to conduct an adequate investigation to develop that evidence. Pet. App. 131a-32a. Wiggins's claims were the subject of a hearing that spanned some five months, with testimony being taken on seven days. JA 2-3, 411-606.

To support his ineffectiveness claim, Wiggins called Hans Selvog, a clinical social worker on the staff of the National Center on Institutions and Alternatives. JA 411-12. Mr. Selvog, who was licensed in Virginia and Washington, D.C., but not in Maryland, had prepared, post-trial, a social history regarding Wiggins. JA 411-18; Cert. App. 163a-198a. In compiling the history, Mr. Selvog had "interview[ed] the defendant, interview[ed] the many family members that we could locate about the defendant's life, reviewed records pertaining to the defendant which included his foster care records, medical records and school records." JA 420. As to records reviewed, Selvog "[p]rimarily relied on the Maryland social service records and some of [Wiggins's] medical records from Baltimore area hospitals." JA 420. It was DSS records, according to Selvog, that provided documentary support for Wiggins's history of physical abuse. JA 464. Wiggins himself was the source of information concerning sexual abuse. JA 453, 461. Selvog did not interview anyone who Wiggins claimed sexually abused him or any of Wiggins's foster parents, and he had no official report from the Department of Social Services or any health care professional documenting claims or incidents of sexual abuse. JA 457-64. According to Selvog, Wiggins's "disorientation to reality" and "his erratic behaviors from being completely dependent and infantile at times to being hostile and aggressive" were consistent with someone who had been physically and sexually abused. JA 445-46. Selvog's report acknowledged that Wiggins hated his biological mother. JA 465.

Wiggins also called attorney Gerald Fisher to support his ineffectiveness claim. JA 543-603. When asked to give his opinion regarding "the minimum requirements for effective representation in capital sentencing," JA 563, Mr. Fisher said that it is incumbent upon counsel to hire an experienced person to "do a comprehensive psycho-social history of your client" by talking to the client and family members and by "going back through all of their social files, juveniles files, criminal records,

whatever other files may exist, subpoenaing those records, collecting them." JA 564.

Lead counsel Carl Schlaich also testified for Wiggins at Wiggins's post conviction hearing. JA 474-513. Before representing Wiggins, Mr. Schlaich had attended a two-day seminar sponsored by the Office of the Public Defender regarding how to conduct a defense in a capital case, and he had gone to other seminars at which topics relevant to death penalty cases were discussed. JA 479-83. At the two-day seminar, "jury selection tactics and mitigation proposals" were two of the subjects covered. JA 480. Mr. Schlaich recalled there having been a presentation by jurors who had served on capital cases, and he "remembered leaving there with the feeling that there was no real answer as to what impressed them and what didn't because everyone had a different opinion. Even people on the same case didn't think that the same thing was important to them." JA 480.

Before representing Mr. Wiggins, Mr. Schlaich had served as lead counsel for Al Wayne Doering, also a capital defendant in a Baltimore County case. JA 475, 501. Regarding the Doering case, Mr. Schlaich testified as follows:

> Q And that case proceeded by jury with both guilt/innocence and sentencing, is that correct?
>
> A No, it was a judge facts and jury sentence.
>
> Q Okay. And in the Doering case isn't it true that you as counsel for the defendant introduced voluminous mitigation evidence with respect to background?
>
> * * *
>
> A Yes.
>
> Q And did that include, as to background of Mr. Doering, a psychiatrist?
>
> A Yes.
>
> Q And a psychologist?
>
> A Yes.
>
> Q And a social worker?
>
> A I can't remember about the social worker. I don't remember.

> Q And Mr. Doering had also killed an elderly person during a burglary, is that correct?
>
> A Yes.
>
> Q There was evidence that Mr. Doering had been sexually abused as a child, is that correct?
>
> A Yes.
>
> Q And physically abused as a child, is that correct?
>
> A Yes.
>
> Q He had been in foster care?
>
> A Yes.
>
> Q And all that information had been presented to the jury in the Doering case, is that correct?
>
> A Yes.
>
> Q And additionally, you had been able to corroborate through records and the testimony of independent witnesses that abuse in the Doering case, is that correct?
>
> A Yes.
>
> Q And what sentence did the Doering jury return?
>
> A Death.

JA 501-03. Coincidentally, the judge at Wiggins's post conviction hearing was the judge at Doering's trial, and he confirmed Schlaich's testimony, saying that Doering "had a horrible childhood. It stunk. He was really messed up in the mind. He was given the death penalty by the jury." JA 473.[7]

Several months before Wiggins's trial, Mr. Schlaich

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[7] Although Doering did not escape the death penalty at the trial level, Mr. Schlaich's efforts at sentencing bore fruit on direct appeal. Notwithstanding that Maryland caselaw at the time was against him, and that this Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), was years away, Mr. Schlaich sought to have information concerning parole eligibility placed before the jury. The Court of Appeals of Maryland set aside Doering's death sentence on the ground that relevant and competent evidence concerning parole eligibility is admissible at a capital sentencing proceeding. *Doering v. State*, 313 Md. 384, 407-12, 545 A.2d 1281, 1292-95 (1988).

transferred from the Public Defender's Office in Baltimore County to that in adjoining Harford County. JA 476. "Most of the factual development" for Wiggins's case had been done before that move, with Mr. Schlaich working "side by side" with co-counsel Michelle Nethercott, "every day," with the work "pretty evenly split." JA 478. After transferring to Harford County, Mr. Schlaich talked to Ms. Nethercott "just about every day" and met with her "face-to-face" once a week. JA 477. Mr. Schlaich estimated having spent approximately 25 to 30% of his time working on Wiggins's case after the move, and, in the last week before trial, Mr. Schlaich had no work responsibilities other than Wiggins's case. JA 477.

Regarding the defense's approach to mitigation at Wiggins's sentencing proceeding, Mr. Schlaich explained as follows:

> A As I recall, we arranged it so that Michelle Nethercott did most of the mitigation preparation. That is my recollection.
>
> Q And did you give her guidance about what to do?
>
> A Yes.
>
> Q What did you tell her to do?
>
> A Well, basically what we did in mitigation was attempt to retry the factual case and try to convince the jury that the State's case on principal issue was just not there.
>
> Q Right. When did you make that decision?
>
> A I don't recall timewise, but I'm sure it was before the trial on the facts because it had to do with how we made the decision about what to recommend to Mr. Wiggins about jury or judge trial, et cetera.

JA 485-86.[8]

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[8] Wiggins claims that counsel failed to investigate mitigating evidence, and attributes the alleged omission to counsel's each believing that "the other was responsible for developing the case in mitigation." Pet. Br. 33. As support, Wiggins relies on Mr. Schlaich's first answer quoted above, and

When trying Wiggins's case, Mr. Schlaich knew that the Public Defender had had social histories prepared in other capital cases, and he was familiar with and had even used the organization with which Mr. Selvog was associated. JA 488-90. When trying Wiggins's case, Mr. Schlaich also knew of the neglect and abuse that Wiggins had suffered, and in this regard specifically testified as follows during questioning by Wiggins's post conviction counsel:

> Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?
>
> A I believe that we tracked all of that down.
>
> Q You got the Social Service records?
>
> A That is what I recall.
>
> Q That was in the Social Service records?
>
> A Yes.
>
> Q So you knew that?
>
> A Yes.
>
> Q You also knew that there were reports of sexual abuse at one of his foster homes?
>
> A Yes.
>
> Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?
>
> A Yes.
>
> Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?
>
> A Yes.
>
> Q And you also knew he was borderline mentally

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cites JA 540 for the proposition that "Nethercott testified that Schlaich had that responsibility." Ms. Nethercott, who otherwise acknowledged that she was aware that use of a defendant's social background could backfire on the defense, JA 540, and whose testimony bolstered Mr. Schlaich's testimony regarding the defense strategy at sentencing, JA 541, actually said: "I really did not have a role in seeking funds or seeking persons to do the expert-." JA 540; *accord* JA 515.

retarded?

A Yes.

Q You knew all –

A At least I knew as it was reported in other people's reports, yes.

Q But you knew it?

A Yes.

JA 490-91.[9]

Mr. Schlaich knew that low intelligence, abusive family background, and sex abuse could be mitigating factors at sentencing, even though he could not name specific cases that set "forth the mitigating standards in a capital case." JA 491-92. He also had experience regarding cross-examination of experts who testify about a defendant's background, which, as explained, "was that once we started opening the door, then the State would start asking about things that could be construed as the person being a danger, as being crazy, as being reasons why the jury shouldn't be particularly merciful." JA 506.

When the prosecutor inquired of Mr. Schlaich whether he also brought "to the trial of the Wiggins case any experience or training regarding the effectiveness of the use of conflicting defenses in front of a jury," Mr. Schlaich responded:

A It is not experience because I don't do that. I try not to, at least. There are I guess two schools of thought on it and one is that you direct your defense at one particular point and you build everything to go after that

[9] Wiggins describes the above-quoted testimony in the following terms: "Schlaich initially claimed that he knew the details of Wiggins' nightmarish upbringing, but quickly backtracked, clarifying that he knew only 'that [information] as it was reported in other people's reports,' *i.e.*, the records of the Department of Social Services in his possession." Pet. Br. 10. Contrary to what Wiggins says, Mr. Schlaich did not backtrack from his assertions regarding what he knew, nor did he identify the DSS records as his source of knowledge. Rather, he simply clarified that the source of his information was what other people had said or what other people had been told.

point. And some defense attorneys I see come in and do a shotgun approach and try a little bit of everything and hope something sticks. I personally try to make a point and start with it and go through the trial with it and finish with it.

Q And did you make an opinion, did you have an opinion as to the tactical wisdom of taking the sentencing to jury and saying he didn't do it but if he did, he had a crummy childhood?

A Well, that is something that we consider in making a choice because we have seen it done. I have seen it done in other cases.

Q And what did you think of that as a tactical position to take?

A It is a difficult position to take. There are things done to try to negate some of the bizzare appearances of that, like having one attorney just do guilt/innocence and one do the sentencing so that they can seem like–try to remove some of that taint of conflicting story there.

But it seems to me if you can get away without doing it, it would be better.

JA 504-05.

Pursuant to Maryland Rule 4-407, Judge Fader filed a statement reflecting his ruling on each ground raised by Wiggins in seeking post conviction relief, and the reasons for the action taken. In his 257-page decision filed in October, 1997, Judge Fader devoted 24 pages to Wiggins's claim that counsel at sentencing had failed to develop and introduce evidence concerning Wiggins's background. Pet. App. 132a-156a. In concluding that counsel had not rendered ineffective assistance as alleged, Judge Fader looked at other cases where counsel's performance had been challenged, including *Burger v. Kemp*, 483 U.S. 776 (1987), and *Strickland v. Washington*, 466 U.S. 668 (1984), Ex 40:249-53, and ruled that

[n]one of the above decisions is on a direct parallel with the facts in this case. To argue differences, is to

argue differences that matter not. This court does not accept Fisher's testimony that it was error not to present information along the lines of the Selvog report. Schlaich made a tactical decision and it was reasonable.

Pet. App. 156a.[10]

In February, 1999, the Maryland Court of Appeals, reviewing Wiggins's ineffectiveness claim de novo, affirmed Judge Fader's decision. Pet. App. 92a-130a. The court said:

> In preparing and presenting appellant's case to the jury at sentencing, trial counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs, or at least at raising a reasonable doubt in that regard. They were, in effect, striving for "two bites at the apple." Notwithstanding that the jury would be, and was, instructed that appellant had been convicted of the crime, the jury still was required to make its own determination, unanimously and beyond a reasonable doubt, that appellant was the actual killer, and, given the entirely circumstantial nature of the State's evidence and the fact that there was some exculpatory evidence, counsel believed that appellant's best hope of escaping the death penalty was for one or more jurors to entertain a reasonable doubt as to his criminal agency.
>
> Counsel were aware that appellant had a most

[10] At page 34 of his brief, Wiggins says that the state post conviction trial judge specifically found "that Wiggins' counsel did not know of the powerful mitigation evidence contained in the social history submitted during post conviction proceedings, JA 606." As support for this proposition, Wiggins cites oral argument at the close of his post conviction hearing, where Judge Fader indicated that he had no reason to believe that counsel had all the information that Selvog had included in his social history. JA 604-06. On reflection, Judge Fader obviously had second thoughts. In his written decision, Pet. App. 137a, he expressly found that counsel had more information than appeared in the PSI, and he quotes Mr. Schlaich's testimony found at JA 490-91.

> unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation report prepared by the Division of Parole and Probation, which included some of appellant's social history, but also more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation. He was aware that the jury could regard that background as a mitigating factor. Indeed, as noted, one or more jurors did find appellant's "background" to be a mitigating factor, although not sufficient to outweigh the aggravating factor that they found. Mr. Schlaich understood that some lawyers use what he regarded as a "shotgun approach," attacking everything and hoping that " something sticks." He was not of that view, however, preferring to concentrate his defense. He did not, therefore, have any detailed background reports prepared, although funds may have been available for that purpose. He expressed some concern that that kind of information might prove counterproductive.

Pet. App. 121a-22a.

The court went on to reject Wiggins's argument, which it characterized as being that "in every capital punishment case, it is mandatory for counsel to prepare and present to the sentencing tribunal any evidence that could be used by the tribunal to find a mitigating circumstance, and certainly any evidence of the defendant's abusive childhood." Pet. App. 123a. The court found that counsel must have leeway to make strategic decisions, and that counsel need not present every conceivable mitigation defense. Pet. App. 124a. Applying these and other principles from *Strickland* and its progeny, the court concluded:

> Counsel made a reasoned choice to proceed with what they thought was their best defense. They knew that there would be at least one mitigating factor–the uncontested fact that appellant had not previously been convicted of a

> violent crime–should the jury not credit their attack on criminal agency. It was not unreasonable for them to choose not to distract from their principal defense with evidence of appellant's unfortunate childhood. As Mr. Schlaich noted, the dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods.

Pet. App. 126a.

E. Proceedings on Federal Habeas Review

Following this Court's denial of his petition for certiorari, *Wiggins v. Maryland*, 528 U.S. 832 (1999) (order), Wiggins filed an application for federal habeas relief in August, 1999. JA 3. The application was granted on September 18, 2001, because the district court (Motz, C.J.) found the evidence at trial insufficient to convict Wiggins of murder and found counsel at sentencing constitutionally ineffective for failing to develop a mitigation case. Pet. App. 28a-91a.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed. Pet. App. 1a-26a. Regarding the Maryland court's decision respecting sufficiency of the evidence to support Wiggins's murder conviction, the Fourth Circuit said: "We are of the opinion and decide that the Maryland Court of Appeals' decision was not only at least minimally consistent with the record of facts found by the trial judge and thus was not unreasonable within the meaning of § 2254(d), it was fully supported by the record." Pet. App. 17a.[11]

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[11] Wiggins suggests that Chief Judge Wilkinson, in his concurring opinion, expressed reservations about the sufficiency of the evidence to support Wiggins's murder conviction. Pet. Br. 15 n.5. This is not so. Chief Judge Wilkinson said: "My own view is that petitioner very probably committed the heinous offense for which he stands convicted. But I cannot say with certainty that he did so." Pet. App. 24a. Chief Judge Wilkinson then suggested that any lack of certitude should inform the Governor's decision whether to commute Wiggins's sentence of death, adding: "To confuse the rule of law here with the role of clemency would only do a disservice to both." Pet. App. 24a.

Regarding the district court's disposition of Wiggins's ineffectiveness claim, the Fourth Circuit said in part:

> We think that despite any superficial similarities to the instant case, the district court's reliance on *Williams v. Taylor* [, 529 U.S. 362 (2000),] to find the Maryland Court of Appeals' decision unreasonable was misplaced. First, *Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland,* and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. Secondly, even if *Williams* did establish such a *per se* rule, it would not have been "clearly established" within the meaning of § 2254, as the *Williams* case was decided more than a year after the Maryland Court of Appeals' decision here. Finally, despite the district court's contention to the contrary, we are of opinion that Wiggins' counsel made a reasonable strategic decision and neither *Williams,* as it may apply here, nor any of *Strickland*'s other progeny, require a different conclusion.

Pet. App. 19a-20a (citations omitted).

SUMMARY OF ARGUMENT

"Under § 2254(d)'s 'unreasonable application' clause, a

federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied *Strickland* incorrectly." *Woodford v. Visciotti*, 123 S. Ct. 357, 360 (2002) (per curiam). Rather, the habeas petitioner must show that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Id.* This Wiggins cannot do.

Under *Strickland*, trial counsel's performance is judged on the facts of the particular case, not in categorical terms as Wiggins proposes. Judicial review of counsel's performance is highly deferential; the court must indulge a "strong presumption" in favor of counsel's professional judgment; and distorting effects of hindsight must be eliminated. 466 U.S. at 689-90. Even if the performance prong of *Strickland* is surmounted, the criminal defendant must make a showing of prejudice. In this case, Wiggins can make neither showing.

Wiggins's premise that his attorneys failed to adequately investigate his background is belied by the state court record and state court fact findings. The record demonstrates counsel knew that Wiggins had psychological problems, had been physically abused and neglected as a child, and had been sexually abused. Trial counsel knew the very things present counsel now put forth as the social history they chide trial counsel for failing to uncover.

That trial counsel knew Wiggins's background does not mean they had to present that information to the jury at sentencing. Experienced attorneys may very well approach the same case quite differently "and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Here, the tactical decisions relating to Wiggins's guilt/innocence trial and sentencing proceeding were part of a cohesive plan to maximize the defendant's chances of an acquittal at trial and to avoid the death penalty at the sentencing phase. The decision to forgo the presentation of Wiggins's social history was a fully informed one, and was well within the range of reasonable

professional judgment. Indeed, to have presented evidence of Wiggins's miserable childhood would have seriously risked undermining the otherwise consistent theory of innocence the sentencing jury did hear. In effect, counsel would have presented inconsistent defenses: "I did not do this, but please consider if you find that I did, that I had a crummy background or lousy childhood." Ex 38:67. This counsel reasonably chose not to do.

Despite many factual differences, Wiggins relies, almost exclusively, on this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000). Far more analogous to Wiggins's case are this Court's decisions in *Strickland*, *Visciotti*, and *Burger v. Kemp*, 483 U.S. 776 (1987). Particularly analogous is *Bell v. Cone*, 122 S. Ct. 1843 (2002), where trial counsel made a strategic decision to waive closing argument at sentencing. There, this Court rejected Cone's contention that such a decision is per se violative of *Strickland*. This Court should likewise reject Wiggins's contention that social history evidence must always be presented to the jury at a capital sentencing. Because trial counsel's tactical decision not to present such evidence was reasonable under *Strickland*, it cannot be said that the state court's ruling to that effect was an unreasonable application of the same case.

Although this Court need not reach the issue of prejudice under *Strickland*, Wiggins has not met his burden of showing a reasonable probability that the outcome of his case would have been different had the jury heard about his childhood. Perhaps the jury would have felt sorry for him, assuming it believed the totality of the information contained in the social history report. But it is equally, if not more, likely that this evidence would have worked to Wiggins's detriment. From what the jury actually heard, there was nothing to suggest that Wiggins was capable of the bizarre crime of which a judge had found him guilty. Had evidence of Wiggins's aggressiveness and hostility been known, as it would have been revealed by the social history, the chance that the jury would have had a

reasonable doubt as to his guilt or first degree principalship would have been severely reduced. In a very real sense, the evidence Wiggins now asserts was so mitigating to his case might very well have seemed aggravating in the minds of the jurors. Even if not aggravating, such evidence would have increased the chances that the jury would view Wiggins as a future danger, and it would have eliminated the possibility of the jurors' harboring a lingering doubt about guilt. Thus, Wiggins cannot sustain his burden under *Strickland*.

ARGUMENT

I.

WIGGINS CANNOT PREVAIL IN THIS COURT UNLESS HE ESTABLISHES THAT THE MARYLAND COURT OF APPEALS UNREASONABLY APPLIED *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT SENTENCING COUNSEL'S PERFORMANCE WAS NOT DEFICIENT, AND UNLESS HE ESTABLISHES ACTUAL PREJUDICE.

"[A] federal habeas application can only be granted if it meets the requirements of 28 U.S.C. § 2254(d)." *Woodford v. Visciotti*, 123 S. Ct. 357, 358 (2002) (per curiam). Section 2254(d) is a "highly deferential standard for evaluating state-court rulings," *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997), "which demands that state court decisions be given the benefit of the doubt," *Visciotti*, 123 S. Ct. at 360. Under § 2254(d), Wiggins cannot prevail in this Court unless he establishes that rejection of his ineffective assistance of counsel claim by the Maryland Court of Appeals "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," 28 U.S.C. § 2254(d)(1), as determined by "the holdings . . . of this Court's decisions as of the time of the relevant state-court decision," *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J.). Consequently, it is *Strickland v. Washington*, 466 U.S. 668 (1984), and decisions such as *Burger v. Kemp*, 483 U.S. 776 (1987), and *Darden v. Wainwright*, 477 U.S. 168 (1986), not the many lower federal and state court opinions cited by Wiggins, that are relevant. *Bell v. Cone*, 122 S. Ct. 1843, 1851-52 (2002).[12]

In *Strickland*, 466 U.S. at 671-701, this Court articulated the general standards for assessing actual ineffectiveness claims: "the defendant must show that counsel's representation fell below an objective standard of reasonableness," *id.* at 688, and the defendant must "affirmatively prove prejudice," *id.* at 693. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

This Court in *Strickland* also explained how a reviewing court is to judge performance and prejudice. "Judicial scrutiny of counsel's performance must be highly deferential." *Id.* at 689. The reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690. All circumstances are to be considered. *Id.* at 688. The court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," as "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at

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[12] Wiggins asserts that the Fourth Circuit "held that a state court decision would pass muster under 28 U.S.C. § 2254(d)(1) so long as it was 'minimally consistent with the facts and circumstances of the case.'" Pet. Br. 15 (quoting Pet. App. 11a). At no point in its opinion reversing the district court's decision on Wiggins's ineffectiveness claim did the Fourth Circuit say, let alone suggest, that the Maryland court's decision was only minimally consistent with the facts and circumstances of the case. Pet. App. 17a-24a. It is clear from reading the court's opinion as a whole that the proper standards for judging claims of ineffective assistance of counsel in the habeas context were applied. In any event, it is this Court's view of the state court opinion that is determinative.

689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Respecting the particular duty to investigate, the *Strickland* Court clarified that its general standards "require no special amplification in order to define counsel's duty." *Id.*

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

Under the appropriate test for prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 693.

Because the Maryland Court of Appeals correctly identified the principles of *Strickland* as governing analysis of Wiggins's ineffectiveness claim, Pet. App. 114a-15a, 121a-27a, Wiggins cannot show that the court's decision is contrary to clearly established law as determined by this Court. *Cf. Bell v. Cone*, 122 S. Ct. at 1851-52 (concluding similarly). To prevail,

then, Wiggins must show that "the state court's adjudication of his claim involved an 'unreasonable application' of *Strickland*." *Id.* at 1852. "[H]e must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance, because under § 2254(d)(1), it is not enough to convince a federal habeas court that, in its independent judgment, the state-court decision applied *Strickland* incorrectly." *Id.* "Rather it is [Wiggins's] burden to show that the state court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, 123 S. Ct. at 360. Wiggins cannot meet this burden, nor can he show actual prejudice.

II.

THE MARYLAND COURT OF APPEALS DID NOT UNREASONABLY APPLY *STRICKLAND v. WASHINGTON* IN CONCLUDING THAT COUNSEL'S PERFORMANCE WAS NOT DEFICIENT.

The Maryland Court of Appeals did not unreasonably apply *Strickland v. Washington* in concluding that counsel's performance was not deficient. Counsel investigated Wiggins's background and that investigation fully satisfied counsel's constitutional obligation. Counsel also made a reasonable tactical decision not to present evidence that could have explained why Wiggins murdered Mrs. Lacs and to present instead a case for why Wiggins was not a first degree principal in the victim's murder.

A. Counsel Investigated Wiggins's Background and that Investigation Fully Satisfied Counsel's Constitutional Obligations.

Well before trial, Wiggins's counsel subpoenaed and obtained all of the records of the Baltimore City Department of Social Services regarding allegations of abuse against Kevin

Wiggins. LM 1-219. The records described the circumstances of neglect–being abandoned by their mother for several days with nothing to eat–that prompted placement of Wiggins and his sisters in foster care. LM 47-50. The records chronicled the circumstances of Wiggins's foster care placements over the years, and tracked his development health-wise, at school, and socially. LM 51-95, 126-36, 140-44, 159-64. The DSS records also contained medical and school records. LM 25-26, 35-43, 96-104, 111-22, 145-47, 167-82, 187-205.[13]

Wiggins's counsel also hired two experts, Dr. William Stejskal and Dr. Robert Johnson, both of whom personally interviewed Wiggins and formed opinions based on their respective fields of expertise. Dr. Stejskal, a psychologist, developed a psychological profile on Wiggins. JA 348-51. Dr. Johnson did a social-psychological assessment of Wiggins's ability to adjust to a life sentence in prison. JA 306-21. The

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[13] Wiggins claims that the Maryland Court of Appeals made "a grievous factual error in suggesting that the social services records revealed to Wiggins' lawyers the squalor and abuse to which Wiggins was subjected as a child," Pet. Br. 35, saying further, *id.* at 36, that, "to the extent the Maryland Court of Appeals' ruling rests on this factual point, it is 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding,' and cannot be upheld under the applicable standard of review. *See* 28 U.S.C. § 2254(d)(2), (e)(1)."

28 U.S.C. § 2254(e)(1) states that "a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he [habeas] applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." In *Sumner v. Mata*, 449 U.S. 539, 547 (1981), this Court made clear that the presumption of correctness under the pre-AEDPA version of § 2254(d), a less deferential standard than current § 2254(e)(1), applied to factual determinations of state appellate courts. Consequently, what is critical in reconstructing the circumstances of counsel's challenged conduct here is that counsel had information that Wiggins had been neglected and physically abused as a child, that he had been sexually abused while in foster care, that he had a personality disorder, and that he had an IQ level that impaired his problem-solving ability but was not brain damaged. That counsel had such information is borne out by the record of the state court proceedings in their entirety.

defense also had the PSI before sentencing. JA 17-24. Most significantly, and whatever the source, be it discussions with Dr. Stejskal, discussions with Wiggins, discussions with family members, transcripts of interviews by Public Defender investigators with family members, or Department of Social Services' records, Mr. Schlaich said, during questioning by Wiggins's post conviction counsel, that he knew that Wiggins was removed from the care of his natural mother due to neglect and abuse; that Wiggins had been sexually abused in one of his foster homes; that Wiggins had been the target of homosexual overtures from a Job Corps supervisor; and that Wiggins was borderline mentally retarded. JA 490-91.

Despite ample opportunity to do so in the course of lengthy state post conviction proceedings, Wiggins has never shown that counsel did not develop the same information that formed the bases for Mr. Selvog's social history of Wiggins. Having elicited the fact of Mr. Schlaich's general knowledge regarding Wiggins's background, including knowledge of physical and sexual abuse, JA 490-91, Wiggins's post conviction counsel did not pursue whether Mr. Schlaich knew the details of Wiggins's background as set forth in Selvog's report. JA 474-98, 508-13. The silence in the record in this regard weighs against Wiggins. As it stands, he has never rebutted the presumption that counsel acted well within the wide range of reasonable professional assistance in investigating Wiggins's background. Given the state of the record, there can be no conclusion but that counsel, at a minimum, conducted a reasonable investigation sufficient to support the decision to pursue the defense that they did without conducting further investigation into Wiggins's background.

B. Counsel Made a Reasonable Tactical Decision Not To Present Evidence of Wiggins's Background and To Pursue Instead a Line of Defense Consistent With Wiggins's Protestations of Innocence.

The American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases states, in Guideline 11.8.6A., that "[c]ounsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence." ABA Amicus Br. App. 14. Counsel in Wiggins's case had just such strong strategic reasons to forgo presenting evidence of Wiggins's background.

Under Maryland's death penalty statute, Wiggins could waive his right to a jury trial without waiving his right to a jury sentencing. Md. Code Ann., Art. 27, § 413(b). Only if Wiggins was found guilty at trial of first degree murder would the case proceed to a capital sentencing hearing. *Id.* § 413(a). Furthermore, notwithstanding what the factfinder at trial might have said on the subject, *Baker v. State*, 332 Md. 542, 549 n.1, 632 A.2d 783, 786 n.1 (1993), *cert. denied*, 511 U.S. 1078 (1994), the sentencing jury first had to determine, unanimously and beyond a reasonable doubt, whether Wiggins was a first degree principal in Mrs. Lacs's murder. Md. Rule 4-343(e). Had it not been persuaded of Wiggins's first degree principalship, the sentencing jury would never have reached the further question, which it was required to decide unanimously and beyond a reasonable doubt, whether Wiggins had committed the murder while committing or attempting to commit a robbery. *Id.*; Art. 27, § 413(d)(10). Nor would the jury have had to consider whether any mitigating circumstances had been proven, and it would not have had to weigh aggravating and mitigating circumstances to determine if a sentence of death was appropriate. Md. Rule 4-343(e); Art. 27, § 413(g) & (h).

Reconstruction of the circumstances of counsel's challenged conduct, in the light of the structure of Maryland's capital sentencing scheme, discloses that counsel's strategic decision to pursue the defense that they did at sentencing fell within the wide range of reasonable professional assistance. On the one hand, the State's evidence regarding both principalship and the aggravating circumstance was entirely circumstantial. Also, Wiggins had no prior convictions for a crime of violence, and so had a ready-made mitigating circumstance that was consistent with his claim of innocence and meant that counsel were in a good position to persuade the sentencing jury not to impose a sentence of death.

On the other hand, counsel were well aware that evidence of Wiggins's background would not necessarily persuade a jury to spare Wiggins's life. Armed with similar information in a prior capital case involving the murder of an elderly victim, counsel had not succeeded in persuading the jury that his client, Al Doering, should be given a life sentence. JA 501-03. More importantly, Wiggins's counsel knew, and even said on the record at the time of sentencing, JA 43-52, 348-51, that the information they had could adversely affect the jury's decisions on the issues of principalship and the aggravating circumstance.

The Baltimore City DSS records showed that Wiggins deliberately agitated conflict and crises in his foster homes. LM 126. He fought in school, LM 87, and with his foster siblings, LM 88, and was at times hostile to social workers, LM 90. Wiggins's erratic behavior made it "extremely difficult" for both DSS and any foster parent "to plan appropriately for him." LM 83. Wiggins left the foster home where he had lived for ten years after having problems with his foster mother, who often entered the bathroom while he was bathing. LM 72. Wiggins later returned to this foster home after arguing with a different foster mother about cleaning the bathroom; Wiggins did not believe it was his responsibility. LM 83. Wiggins was fired from a job due to his "uncontrollable temper and behavior." LM 89. He was once arrested after stealing a

flammable liquid and food, and attempting to set a fire to a carry-out shop. LM 93. This information, which painted a picture of a man who had violent tendencies, not only was harmful to the defense of innocence, but it easily could have suggested future dangerousness, and it had the potential to undermine the very powerful mitigating circumstance of lingering doubt.

Counsel's handling of Wiggins's case under the circumstances clearly fell within the wide range of reasonable professional assistance. Close inspection of counsel's performance shows them following a consistent course of action throughout trial and sentencing that was designed to take advantage of the weaknesses in the State's case and to minimize the chances that the death penalty would be imposed. This can be seen in five discrete actions taken by counsel.

First, before trial, counsel attempted to circumvent the sentencing phase completely by asking the court to require the State to make a prima facie showing regarding the aggravating circumstance it alleged, i.e., that the murder occurred in the course of a robbery or attempted robbery. The vagaries of the State's evidence regarding time of death made this tactical decision reasonable.

Second, for purposes of trial, counsel advised Wiggins to waive a jury. Counsel were concerned that a death-qualified jury would be more prone to convict, and they hoped that Judge Hinkel would look beyond the circumstances of the crime and make an intellectual decision based on reasonable doubt. Inconsistencies in the evidence relevant to time of death made this tactical move reasonable, as did other weaknesses in the State's case.

Third, before sentencing, counsel tried to persuade Judge Hinkel to bifurcate the sentencing proceedings so that the jury would decide the issue of principalship without hearing about Wiggins's psychological problems and background. Before the defense closed its case at sentencing, counsel renewed their motion to bifurcate. Given that information about Wiggins's

background had the potential to paint a portrait of a man prone to violence, counsel's efforts to have the issue of principalship decided in advance of the defense's case in mitigation were clearly reasonable.

Fourth, at sentencing itself, counsel defended on the ground that the State's evidence failed to show that Wiggins was a principal in the first degree in the murder and on the ground that the State could not establish that Wiggins came into possession of the victim's property by robbing and killing her. Counsel at sentencing had the advantage of a proven statutory mitigating circumstance that was consistent with Wiggins's claim of innocence. Thus, the jury would have to engage in the weighing of aggravating and mitigating circumstances if it progressed beyond the point of finding that Wiggins was a first degree principal in the victim's murder and that the murder occurred during the commission of a robbery or attempted robbery. The evidence relating to time of death and the other weaknesses in the State's case made this a reasonable tactical decision, as did the fact that it was Wiggins, who steadfastly maintained his innocence, who had the ultimate say as to whether he would allocute at sentencing and what he would say during that allocution.[14]

Fifth, by proceeding as they did, counsel had the benefit of a lingering-doubt defense. "'[R]esidual doubt has been recognized as an extremely effective argument for defendants

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[14] In arguing now, Pet. Br. 19, 41-44, 49, that trial counsel "could have had it both ways"–that counsel could have used Wiggins's social history to show that Wiggins's role in Mrs. Lacs's murder was that of an accomplice to or pawn of others–Wiggins ignores that at trial and sentencing he consistently maintained his innocence. As specific support for the argument that trial counsel at sentencing acted unreasonably in not attempting to have it "both ways," Pet. Br. 41, Wiggins cites Judge Niemeyer's concurring opinion at Pet. App. 24a-26a. In so doing, Wiggins ignores that Judge Niemeyer ultimately said: "But in the end, this may be only a luxury of hindsight. There is support in the record from which to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue." Pet. App. 25a-26a.

in capital cases,'" particularly where the jury that decides guilt/innocence determines sentence. *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citation omitted). And although Wiggins suggests that the defense of lingering doubt was unavailable in his case because the jury that decided his sentence did not decide guilt/innocence, Pet. Br. 45, he is wrong. The sentencing jury had to decide, before anything else, the issue of principalship, i.e., whether Wiggins was personally responsible for murdering Mrs. Lacs. Consequently, residual doubt was very much an available defense in Wiggins's case. Significantly, since this Court's decision in *Lockhart v. McCree*, a number of studies have consistently shown that residual doubt is by far the most compelling circumstance that jurors look to in deciding not to impose a sentence of death. *See, e.g.*, Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N.Ill.U.L.Rev. 41, 56-60 (2001); William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1529 (1998); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 28 (1988).

On the issue of strategy pursued, then, Wiggins has not shown that counsel failed to make all significant decisions in the exercise of reasonable professional judgment. More importantly, contrary to Wiggins's claim that counsel's strategy had no chance of prevailing because the jurors were instructed that they were bound by Wiggins's conviction of first degree murder, Pet. Br. 44-45, three state appellate judges' views defeat this position. On direct appeal, although all seven judges found the evidence sufficient to support Wiggins's murder conviction, two judges found the evidence insufficient

on the issue of first degree principalship. Br. in Opp. App. 32a-38a. Likewise, on collateral review, two state appellate judges (one of whom had dissented on direct appeal) would have granted Wiggins relief on the ground that the State's evidence did not establish that Wiggins personally killed Mrs. Lacs. Pet. App. 128a-30a.

Most importantly, Wiggins has not rebutted the presumption that counsel acted within the wide range of reasonable professional assistance by not presenting evidence of Wiggins's background and by pursuing instead a line of defense consistent with his protestations of innocence. Consequently, Wiggins cannot prevail in this Court.

C. When Viewed in the Light of This Court's Recent Decisions, There Can Be No Doubt that the Maryland Court of Appeals' Decision Was Not an Unreasonable Application of *Strickland*.

There can be no disputing that this Court's decision of *Williams v. Taylor* is critical to Wiggins's argument that counsel's performance was deficient. But, to borrow Wiggins's own words, "*Williams* broke no new ground." Pet. Br. 24. *Williams* stands as nothing more than an example of when the failure to investigate and present mitigating evidence, in the absence of a reasonable basis for that omission, rises to the level of a violation of the Sixth Amendment right to effective assistance of counsel.

No matter how hard Wiggins tries, he cannot escape the fact that the circumstances of his case are markedly distinguishable in at least six ways from those in *Williams*. In *Williams*, the defendant had confessed to the robbery and murder for which he received the death penalty. 529 U.S. at 367-68. Wiggins steadfastly maintained his innocence and the prosecution's case was entirely circumstantial. Williams had a prior record for crimes of violence. *Id.* at 368. Wiggins had no prior criminal record. In *Williams*, the prosecution's experts testified that Williams posed "a serious continuing threat to

society," *id.* at 369, yet these same experts would have testified "that Williams, if kept in a 'structured environment,' would not pose a future danger to society," *id.* at 371; however, counsel did not elicit this testimony nor did counsel call correctional officers who would have testified that Williams was unlikely "to act in a violent, dangerous or provocative way," *id.* at 396. Defense counsel in Wiggins's case called an expert who testified that persons serving life sentences tend to be "model prisoners," JA 311, and that Wiggins fit the general profile of a lifer, JA 319. Williams's trial lawyers failed to conduct an investigation into his background because they incorrectly thought state law barred access to such records. 529 U.S. at 373. Wiggins's attorneys obtained social service and other records, and uncovered evidence of Wiggins's nightmarish childhood, but chose as a matter of strategy not to present such. Williams's counsel failed to call a certified public accountant as a character witness out of neglect rather than as a matter of trial strategy. *Id.* at 396. There is no evidence in Wiggins's case that counsel failed to call witnesses out of neglect. Finally, defense counsel's closing in *Williams* focused on how Williams had shown no mercy to his victims and probably did not deserve mercy himself. *Id.* at 369 & n.2. Closing argument in Wiggins's case stressed his innocence and residual doubt as to his role as first degree principal in the crime.

Instead of *Williams v. Taylor*, it is *Strickland v. Washington* and cases such as *Burger v. Kemp* and *Bell v. Cone* that involve circumstances most like those in Wiggins's case. It is the decisions in those cases that show that the Maryland Court of Appeals did not unreasonably apply *Strickland* in concluding that counsel's performance was not deficient. In *Strickland*, petitioner pleaded guilty against counsel's advice; during the plea colloquy petitioner told the trial judge that he had no significant prior criminal record and that he had been under extreme stress at the time of the crimes. 466 U.S. at 672. In preparing for sentencing, counsel spoke to petitioner about his background. *Id.* For purposes of sentencing, counsel relied

on the information communicated during the plea colloquy, thereby ensuring that contrary character and psychological evidence and petitioner's criminal history were not introduced. *Id.* at 673, 699. In applying the general principles announced in *Strickland* to the facts before it, this Court, "even without application of the presumption of adequate performance," *id.* at 699, found that trial counsel's defense, including his "decision not to seek more character or psychological evidence than was already in hand," "was the result of reasonable professional judgment," *id.*

In *Burger*, counsel was aware of some, but not all, of his client's background prior to trial. 483 U.S. at 790. Acknowledging that counsel "could well have made a more thorough investigation than he did," *id.* at 794, this Court said:

> Nevertheless, in considering claims of ineffective assistance of counsel, "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." *United States v. Cronic,* 466 U.S. 648, 665 n.38 (1984). We have decided that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland,* 466 U.S. at 690-691. Applying this standard, we agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment. It appears that he did interview all potential witnesses who had been called to his attention and that there was a reasonable basis for his strategic decision that an explanation of petitioner's history would not have minimized the risk of the death penalty. Having made this judgment, he reasonably determined that he need not undertake further investigation to locate witnesses who would make statements about Burger's past.

483 U.S. at 794-95.

Most recently, in *Bell v. Cone*, 122 S. Ct. at 1847-54, where counsel in a capital case did far less at sentencing than did counsel in Wiggins's case, this Court concluded that petitioner could not show that the Tennessee Court of Appeals had applied *Strickland* in an objectively unreasonable manner. *Id.* at 1852-54. Regarding counsel's having relied on evidence introduced at trial to establish mitigating circumstances at sentencing, this Court concluded that Cone's counsel reasonably could have concluded that the testimony of trial witnesses was still fresh in the jurors' minds. *Id.* at 1853. Regarding counsel's not calling petitioner and other witnesses, this Court noted that Cone's counsel circumvented introduction of evidence about petitioner's criminal history and avoided the possibility that petitioner during cross-examination would lash out at the prosecutor and alienate the jury. *Id.* Regarding counsel's waiver of closing argument, this Court recognized that Cone's attorney deprived the lead prosecutor, "who all agreed was very persuasive," of the chance to depict petitioner "as a heartless killer just before the jurors began deliberation." *Id.* at 1854. This Court then concluded its opinion in *Cone*, as did the Maryland Court of Appeals in Wiggins's case, Pet. App. 126a-27a, by referring back to *Strickland*. For its part, this Court said:

> We cautioned in *Strickland* that a court must indulge a "strong presumption" that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight. Given the choices available to respondent's counsel and the reasons we have identified, we cannot say that the state court's application of *Strickland*'s attorney-performance standard was objectively unreasonable.

122 S. Ct. at 1854 (citation omitted).

Viewed in the light of these other decisions, it is Wiggins's position that counsel performed deficiently, not the decision of the Maryland Court of Appeals concluding otherwise, that is an

unreasonable application of *Strickland*. By pressing the position that he does, Wiggins asks this Court to rule that it is deficient performance as a matter of law not to develop and present a social history along the lines of that produced by Hans Selvog. *Strickland*'s general principles and its holding that counsel's performance in that case was not deficient defeat Wiggins's position, as do the holdings of *Burger v. Kemp* and *Bell v. Cone*. *See also Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986) (rejecting claim that counsel did not delve sufficiently into petitioner's background and so were unprepared to present mitigating evidence at sentencing).

If Wiggins's position is accepted, criminal defense attorneys in capital cases will be forced to present evidence like that developed by Mr. Selvog in every instance. Thus strait-jacketed, attorneys in capital cases would lack "the wide latitude counsel must have in making tactical decisions." *Strickland*, 466 U.S. at 689. "Counsel's performance and even willingness to serve could be adversely affected." *Id.* at 690. "[R]igid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." *Id.*

As this Court stated in *Strickland*: "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688-89. Even the ABA Guideline quoted previously does not require that every case be conducted in the same way. As this Court recognized in *Strickland*, "[t]here are countless ways to provide effective assistance in any given case" and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. In Wiggins's case, it was reasonable for counsel to defend Wiggins as they did. More significantly, the decision of the Court of Appeals of Maryland finding that counsel did not perform deficiently was not an

unreasonable application of this Court's caselaw.

III.

WIGGINS CANNOT ESTABLISH THAT COUNSEL'S PERFORMANCE WAS PREJUDICIAL.

Rounding out his argument, Wiggins contends, as he must to prevail under *Strickland* and its progeny, that there is a reasonable probability that, but for counsel's performance, the result of his sentencing proceeding would have been different. Pet. Br. 45-50. Because Wiggins did not persuade the state courts that counsel's performance was outside the wide range of reasonable professional judgment, those courts did not resolve the issue of prejudice. This is not to say that Wiggins can show that counsel's performance had the necessary adverse effect on his sentencing proceeding. He cannot.

Williams v. Taylor teaches that in assessing prejudice in a case where counsel is attacked for not presenting mitigating evidence at sentencing, the reviewing court must "evaluate the totality of available mitigation evidence–both that adduced at trial, and the evidence adduced in the habeas proceeding in reweighing it against the evidence in aggravation." 529 U.S. at 397-98. Performing this analysis in Wiggins's case does not demonstrate a reasonable probability that the result of Wiggins's sentencing proceeding would have been different had the evidence adduced in state post conviction proceedings, i.e, the Selvog social history, been presented for the sentencing jury's consideration.

Had the Selvog social history been introduced at sentencing, it would have been subjected to the full adversarial process. Mr. Selvog would have been vigorously cross-examined, and his own biases, as well as flaws in both his method of developing information and the information itself, would have been revealed. The jurors would have heard that Selvog's sole source of information about sexual abuse was

Wiggins. JA 453, 461. The jury would have heard that, notwithstanding his obligation under Maryland law to do so, Selvog did not report the sexual abuse to law enforcement authorities. JA 451-53. The jury would have heard that Selvog was asked to chronicle only Wiggins's early years, not his years beyond adolescence. JA 458. The jury would have heard that Selvog did not include information from one of Wiggins's siblings in his report. JA 455.

Had the Selvog social history been introduced at sentencing, the State, in addition to being able to cross-examine Selvog, would have been in a position to give its own interpretation to the information contained in the report and to counter Selvog's report with evidence of its own. As lead counsel for Wiggins said during his testimony at Wiggins's post conviction hearing: "[O]nce we started opening the door, then the State would start asking about things that could be construed as the person being a danger, as being crazy, as being reasons why the jury shouldn't be particularly merciful." JA 506. *Accord Bell v. Cone*, 122 S. Ct. at 1853 (acknowledging that calling witnesses from petitioner's childhood days or days in the Army could have opened the door at sentencing to testimony about petitioner's criminal history); *Burger v. Kemp*, 483 U.S. at 789-95 (recognizing that information not presented at sentencing, in addition to not being uniformly helpful, had the potential to bring damaging facts to the sentencing jury's attention); *Darden v. Wainwright*, 477 U.S. at 186-87 (noting that prosecution could have responded to evidence not introduced at sentencing with evidence of petitioner's prior convictions and a psychiatric report indicating that petitioner could very well have committed the crime); *Strickland v. Washington*, 466 U.S. at 699 (acknowledging that presenting evidence that counsel was faulted for not introducing at sentencing would have opened the door to damaging rebuttal evidence).

Considered in the context of Wiggins's case, the Selvog social history had the potential to strengthen the prosecution's

case at sentencing. The report showed that Wiggins was hostile and aggressive, that he had problems distinguishing fantasy from reality, and that he hated his biological mother. JA 465. To a juror's mind, the information in the Selvog report could have added weight to the prosecution's evidence, by explaining why Wiggins would drown an elderly lady, and leave her in a bathtub filled with insecticide with her skirt hiked to her waist and without any underwear on, for the sole purpose of taking the victim's old car, a ring worth $30 to $50 when pawned, and a few store credit cards. Strengthening the State's case in these regards was the last thing defense counsel wanted. They needed only to persuade one juror that Wiggins was not a first degree principal in Mrs. Lacs's murder to avoid the death penalty. Persuading one juror that the aggravating circumstance had not been proven beyond a reasonable doubt also meant a life sentence for Wiggins.

In addition to strengthening the State's case for why Wiggins was death eligible and why death was the appropriate penalty for the victim's murder, the Selvog social history had the potential to weaken Wiggins's case in mitigation. The Selvog social history, with its evidence of abuse, while perhaps diminishing Wiggins's blameworthiness for a crime he claimed he did not commit, could just as well have indicated that there was a probability that Wiggins would be dangerous in the future. *Penry v. Lynaugh*, 492 U.S. 302, 324 (1989). The history was powerful evidence that Wiggins had hostile and aggressive tendencies. JA 446. Obviously, the defense wanted to avoid any suggestion of future dangerousness. Rather than offer the jury the opportunity to contemplate such matters, counsel instead looked to Dr. Johnson to say that Wiggins would adjust decently to prison were he given a life sentence. Furthermore, had the defense offered the Selvog social history, and the State countered with evidence of its own, the juror or jurors who found Wiggins's background to be a mitigating circumstance might well have been persuaded otherwise by the more comprehensive picture.

Just as it would have strengthened the State's case for why Wiggins was death eligible and deserving of the death penalty, and just as it would have diminished other aspects of the defense's case in mitigation, the Selvog report would have eviscerated lingering doubt, and left the jury with even less in the balance for Wiggins when it came to weighing aggravating and mitigating circumstances. In short, when the Selvog social history is considered along with the mitigating evidence actually adduced at sentencing, Wiggins cannot sustain his burden to show that there is a reasonable probability that but for counsel's performance he would not have been sentenced to death. For this reason, too, Wiggins is not entitled to habeas relief under 28 U.S.C. § 2254(d).

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be affirmed.

Respectfully submitted,

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APPENDIX

MD. CODE ANN., ARTICLE 27, § 413 (1987 Repl. Vol. & 1989 Cum. Supp.). SENTENCING PROCEDURE UPON FINDING OF GUILTY OF FIRST DEGREE MURDER.

(a) *Separate sentencing proceeding required.* — If a person is found guilty of murder in the first degree, and if the State had given the notice required under § 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death.

(b) *Before whom proceeding conducted.* — This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) *Evidence; argument; instructions.* — (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to § 412 (b) of this article;

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior

convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death, imprisonment for life without the possibility of parole, or imprisonment for life, and the burden of proof applicable to these findings in accordance with subsection (f) or subsection (h) of this section.

(d) *Consideration of aggravating circumstances.* — In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit a robbery, arson, rape or sexual offense in the first degree.

(e) *Definitions.* — As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d) (7) of this section, include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) (i) The term "law enforcement officer" has the meaning given in § 727 of Article 27.

(ii) The term "law enforcement officer", as used in subsection (d) of this section, includes:

1. An officer serving in a probationary status;
2. A parole and probation officer;
3. A law enforcement officer of a jurisdiction outside of Maryland; and

4. If the law enforcement officer is wearing the uniform worn by the law enforcement officer while acting in an official capacity or is prominently displaying his official badge or other insignia of office, a law enforcement officer privately employed as a security officer or special policeman under the provisions of Article 41, §§ 4-901 through 4-913 of the Code.

(4) "Imprisonment for life without the possibility of parole" means imprisonment for the natural life of an inmate under the custody of a correctional institution, including the Patuxent Institution.

(f) *Finding that no aggravating circumstances exist.* — If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and a sentence of death may not be imposed.

(g) *Consideration of mitigating circumstances.* — If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) been found guilty of a crime of violence; (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so

substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in the case.

(h) *Weighing mitigating and aggravating circumstances.* — (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, a sentence of death may not be imposed.

(i) *Determination to be written and unanimous.* — The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) *Statements required in determination.* — The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to

exist;

(3) Whether any mitigating circumstances found under subsection (g) of this section outweigh the aggravating circumstances found under subsection (d) of this section;

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) *Imposition of sentence.* — (1) If the jury determines that a sentence of death shall be imposed under the provisions of this section, then the court shall impose a sentence of death.

(2) If the jury, within a reasonable time, is not able to agree as to whether a sentence of death shall be imposed, the court may not impose a sentence of death.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall determine whether a sentence of death shall be imposed under the provisions of this section.

(4) If the court or jury determines that a sentence of death may not be imposed, and the State did not give the notice required under § 412 (b) of this article of intention to seek a sentence of life imprisonment without the possibility of parole, the court shall impose a sentence of life imprisonment.

(5) If the State gives the notice required under § 412 (b) of this article of intention to seek a sentence of imprisonment for life without the possibility of parole but does not give notice of intention to seek the death penalty, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(6) If the State gives the notice required under § 412 (b) of this article of intention to seek the death penalty in addition to the notice of intention to seek a sentence of

imprisonment for life without the possibility of parole, and the court or jury determines that a sentence of death may not be imposed under the provisions of this section, that court or jury shall determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(7) (i) In determining whether to impose a sentence of imprisonment for life without the possibility of parole, a jury shall agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole.

(ii) If the jury agrees unanimously to impose a sentence of imprisonment for life without the possibility of parole, the court shall impose a sentence of imprisonment for life without the possibility of parole.

(iii) If the jury, within a reasonable time, is not able to agree unanimously on the imposition of a sentence of imprisonment for life without the possibility of parole, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(8) If the State gives the notice required under § 412 of this article of the State's intention to seek a sentence of imprisonment for life without the possibility of parole, the court shall conduct a separate sentencing proceeding as soon as practicable after the trial has been completed to determine whether to impose a sentence of imprisonment for life or imprisonment for life without the possibility of parole.

(l) *Rules of procedure.* — The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) *Alternate jurors.* — (1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3)(i) If any juror dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing.

[Maryland's death penalty statute is now codified at Sections 2-202 and 2-303 of the Criminal Law Article of the Maryland Annotated Code.]

MARYLAND RULE 4-343 (1989). SENTENCING — PROCEDURE IN CAPITAL CASES.

(a) Applicability. — This Rule applies whenever a sentence of death is sought under Code, Article 27, § 413.

(b) Statutory Sentencing Procedure. — When a defendant has been found guilty of murder in the first degree, the State has given the notice required under Code, Article 27, § 412(b) (1), and the defendant may be subject to a sentence of death, a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of Code, Article 27, § 413.

(c) Judge. — Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) Allocution. — Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(e) Form of Written Findings and Determinations. — Except as otherwise provided in section (f) of this Rule, the findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following statements marked "proven" has been proven BEYOND A REASONABLE DOUBT and that each of those statements marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The defendant was a principal in the first degree to the murder.

....	....
proven	not proven

2. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

....	....
proven	not proven

(If one or both of the above are marked "proven," complete Section II. If both are marked "not proven," proceed to Section V and enter "Life Imprisonment.")

Section II

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked

"proven" has been proved BEYOND A REASONABLE DOUBT and we unanimously find that each of the aggravating circumstances marked "not proven" has not been proven BEYOND A REASONABLE DOUBT.

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

.... proven .... not proven

2. The defendant committed the murder at a time when confined in a correctional institution.

.... proven .... not proven

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

.... proven .... not proven

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

.... proven .... not proven

5. The victim was a child abducted in violation of Code, Article 27, § 2.

.... proven .... not proven

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

.... proven .... not proven

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

.... proven .... not proven

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

.... proven .... not proven

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

.... proven .... not proven

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape in the first degree, or sexual offense in the first degree.

.... proven .... not proven

(If one or more of the above are marked "proven," complete III. If all of the above are marked "not proven," do not complete Sections III and IV and proceed to Section V and enter "Life Imprisonment.")

Section III

Based upon the evidence, we make the following determinations as to mitigating circumstances:

1. The defendant has not previously (i) been found guilty of a crime of violence; or (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

(As used in the preceding paragraph, "crime of violence" means abduction, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.)

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

3. The defendant acted under substantial duress, domination, or provocation of another person, even though not so substantial as to constitute a complete defense to the prosecution.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

5. The defendant was of a youthful age at the time of the crime.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

6. The act of the defendant was not the sole proximate cause of the victim's death.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(Mark only one.)

☐ (a) We unanimously find by a preponderance of the evidence that the above circumstance exists.

☐ (b) We unanimously find by a preponderance of the evidence that the above circumstance does not exist.

☐ (c) After a reasonable period of deliberation, one or more of us, but fewer than all 12, find by a preponderance of the evidence that the above circumstance exists.

8. (a) We unanimously find by a preponderance of the evidence that the following additional mitigating circumstances exist:

.....

.....

.....

.....

(Use reverse side if necessary)

(b) One or more of us, but fewer than all 12, find by a preponderance of the evidence that the following additional mitigating circumstances exist:

.....

.....

.....

.....

(Use reverse side if necessary)

(If the jury unanimously determines in Section III that no mitigating circumstances exist, do not complete Section IV. Proceed to Section V and enter "Death." If the jury or any juror determines that one or more mitigating circumstances

exist, complete Section IV.)

Section IV

Each individual juror shall weigh the aggravating circumstances found unanimously to exist against any mitigating circumstances found unanimously to exist, as well as against any mitigating circumstance found by that individual juror to exist.

We unanimously find that the State has proven by A PREPONDERANCE OF THE EVIDENCE that the aggravating circumstances marked "proven" in Section II outweigh the mitigating circumstances in Section III.

....	....
yes	no

Section V

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "not proven," enter "Life imprisonment."

2. If the answer in Section II is marked not "proven," enter "Life Imprisonment."

3. If Section III was completed and the jury unanimously determined that no mitigating circumstance exists, enter "Death."

4. If Section IV was completed and marked "no," enter "Life Imprisonment."

5. If Section IV was completed and marked "yes," enter "Death."

We unanimously determine the sentence to be

.....

Section VI

If "Life Imprisonment" is entered in Section V, answer the following question:

Based upon the evidence, does the jury unanimously determine that the sentence of life imprisonment previously entered shall be without the possibility of parole?

	yes	no
Foreman	....	....
Juror 2	....	....
Juror 3	....	....
Juror 4	....	....
Juror 5	....	....
Juror 6	....	....

or,

.....
JUDGE

(f) Deletions from Form. — Unless the defendant requests otherwise, Section II of the form set forth in section (e) of this Rule shall not include any aggravating circumstance that the State has not specified in the notice required under Code, Article 27, § 412(b) (1) of its intention to seek a sentence of death. Section VI of the form shall not be submitted to the jury unless the State has given the notice required under Code, Article 27, § 412(b) (2) of its intention to seek a sentence of imprisonment for life without the possibility of parole.

(g) Advice of the Judge. — At the time of imposing a sentence, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review.

(h) Report of Judge. — After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
   - A. Date of Birth
   - B. Sex
   - C. Race
   - D. Address
   - E. Length of Time in Community
   - F. Reputation in Community
   - G. Family Situation and Background
     1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
     2. Family history (describe family history including pertinent data about parents and siblings)
   - H. Education
   - I. Work Record
   - J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
   - K. Military History
   - L. Pertinent Physical or Mental Characteristics or History
   - M. Other Significant Data About Defendant

II. Data Concerning Offense
   - A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
   - B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so describe.
   - C. Did the defendant know the victim prior to the

offense?
Yes ..... No .....
1. If so, describe relationship.
2. Did the prior relationship in any way precipitate the offense? If so, explain.

D. Did the victim's behavior in any way provoke the offense? If so, explain.

E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community

F. Any Other Significant Data About Offense

III. A. Plea Entered by Defendant:
Not guilty .....; guilty .....; not criminally responsible .....

B. Mode of Trial:
Court ..... Jury .....
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.

C. Counsel
1. Name
2. Address
3. Appointed or retained
(If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity — Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motions made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether

they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which State relied in pre-trial notice.

B. Was the proceeding conducted
before same judge as trial? .....
before same jury? .....
If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel — If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death
Life imprisonment without the possibility of parole

V. Chronology
Date of Offense
Arrest
Charge
Notification of intention to seek penalty of death
Trial (guilt/innocence) — began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding — began and ended
Sentence Imposed

VI. Recommendation of Trial Court As To Whether Imposition of Sentence of Death is Justified.

VII. A copy of the Findings and Sentencing Determination made in this action is attached to and made a part of

this report.

.....
Judge

CERTIFICATION

I certify that on the ..... day of ....., 19 ..... I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

.....
Judge

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

(10)

Supreme Court U.S.
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No. 02-311

IN THE

Supreme Court of the United States

KEVIN WIGGINS,
Petitioner,

v.

SEWALL SMITH, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

The State refuses to come to grips with the question this case actually presents: whether the Fourth Circuit misconstrued the rule of *Strickland v. Washington* in holding that a lawyer's decision to stop investigating potential mitigation evidence in a capital case is "virtually unchallengeable" once the lawyer knows rudimentary facts about the client's background, even though that knowledge would *not* support a reasonable professional judgment to terminate investigation. *See* Pet. at i (Question Presented). Rather than confront this question, the State and its supporting *amici* attack legal arguments petitioner has not advanced, rely on "factual findings" the state courts did not make, and ignore the parts of the record that refute their *post hoc* characterization of counsel's sentencing "strategy." Ironically, if any party's perception is affected by the "distorting prism of hindsight" in this case (Resp. Br. at 1), it is the State's.

The State and its *amici* contend, for example, that petitioner's claim requires acceptance of the sweeping rule that counsel must always investigate mitigation completely (no matter how unlikely the effort is to bear fruit) and must always present that evidence to the sentencer (irrespective of its persuasive force). *See* Resp. Br. at 45; U.S. Br. at 29-30. That is a caricature. Wiggins is entitled to relief under *Strickland*'s carefully circumscribed rule that "strategic choices made after less than complete investigation are reasonable" only insofar as "reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). He is entitled to relief under that rule because the Maryland Court of Appeals applied the rule unreasonably (within 28 U.S.C. § 2254(d)(1)), and based its decision on an unreasonable determination of the pertinent facts (within 28 U.S.C. § 2254(d)(2)), when it upheld a "tactical" choice by Wiggins' lawyers to shut down their mitigation investigation and instead "retry the factual case" at the sentencing stage, JA 485. That decision was not a reasonable professional

judgment *in light of the facts they knew at the time*.

Any reasonably competent attorney possessing the information contained in Wiggins' social service records would have realized that a powerful case in mitigation was potentially available, and would have developed that case prior to making definitive judgments about how best to defend Wiggins at sentencing. Nor can the termination of the investigation be justified by a decision to focus on principalship. Up until the day before the sentencing hearing, Wiggins' lawyers had intended to put on a mitigation case if their bifurcation motion had been granted. Whether that motion had been granted or denied, Wiggins' lawyers were in no position either to make a powerful mitigation case or to decide whether to do so. The tactical choice by Wiggins' lawyers to "retry the factual case" was unreasonably uninformed, and it deserves no deference.

Because the choice on the part of Wiggins' counsel to abandon their investigation into mitigation is indefensible, the State pretends that the choice never happened. Specifically, the State defends the judgment of the Maryland Court of Appeals on the basis of that court's ruling that Wiggins' counsel was fully informed about available mitigation evidence, and thus cannot be faulted for investigating inadequately. But the factual finding on which the state court's conclusion rests has been proved erroneous by clear and convincing evidence. *See* Pet. Br. at 35-36; 28 U.S.C. § 2254(e)(1). As the social service records themselves make clear, the Maryland court was wrong when it stated that Wiggins' lawyers had learned the facts of his nightmarish upbringing from "social service records that recorded instances of physical and sexual abuse." Pet. App. 121a. The Court of Appeals made no other finding that would support the conclusion that Wiggins' lawyers knew the key mitigation facts. Indeed, Wiggins' lawyers plainly did not know those facts: for example, they made no mention of the mitigation evidence in their proffer in support of their motion to bifurcate

sentencing, an omission that would be inexplicable if the lawyers were aware of this evidence. Moreover, the state postconviction trial court – which heard the testimony on which the State now relies (Resp. Br. at 21-22, 33-34) – found that Wiggins' lawyers did not know the mitigation facts contained in the social history. *See infra* pages 13-14. The State's contrary assertion in this Court is thus pure conjecture that flies in the face of the credibility conclusions of the state judge who heard the evidence. To the extent the Maryland Court of Appeals' judgment rests on the factual finding that Wiggins' lawyers knew the facts of their client's background (as opposed to the legal conclusion that counsel had no duty to investigate), it is objectively unreasonable, and relief is warranted under 28 U.S.C. § 2254(d)(2).

Even if Wiggins' lawyers had not defaulted on their obligation to investigate, their sentencing tactics would nevertheless violate *Strickland*'s bedrock requirement of competent performance. The gist of the State's argument is that Wiggins' lawyers reasonably chose to forgo mitigation evidence and to concentrate instead on defeating the State's effort to prove Wiggins was a principal in the first degree. But Wiggins' lawyers did not pursue that strategy. Far from it. They put on an expert witness whose sole function was to offer mitigation evidence – namely that Wiggins would shed any violent tendencies once imprisoned for life. That testimony not only diverted attention from the principalship issue, but also introduced the idea that Wiggins might be violent – the very notion the State now claims Wiggins' lawyers structured their presentation to avoid. Moreover, Wiggins' lawyers expressly invited the members of the jury to look beyond principalship and consider Wiggins' "difficult life" as well as the facts of the crime in making their sentencing judgment. When counsel subsequently failed to introduce any evidence that would have allowed the jury to take up that invitation, they telegraphed that there was no mitigation case to be made on Wiggins' behalf. Counsel's

neglect of mitigation cannot, therefore, be justified on the ground that it would have been inconsistent with concentrating on the principalship issue and avoiding distractions.

Finally, Wiggins was prejudiced by his counsel's performance. The State's principal response – that Wiggins cannot show prejudice because his evidence is double-edged – is an unsupported generality that would foreclose virtually all ineffective assistance claims based on a failure to investigate and present mitigation evidence. The State's position is, in any event, foreclosed by *Williams v. Taylor*, 529 U.S. 362 (2000), which rejected a nearly identical claim.

I. THE DECISION OF THE MARYLAND COURT OF APPEALS IS AN OBJECTIVELY UNREASONABLE APPLICATION OF *STRICKLAND* AND IS BASED ON AN UNREASONABLE FACTUAL DETERMINATION.

A. The Decision by Wiggins' Lawyers to Retry Guilt to the Exclusion of Mitigation Was Not Supported by a Reasonable Professional Judgment.

Wiggins is entitled to relief under 28 U.S.C. § 2254(d)(1) because the Maryland Court of Appeals applied *Strickland* in an "objectively unreasonable" manner. *See Williams v. Taylor*, 529 U.S. at 409 (opinion of Justice O'Connor for a majority of the Court construing 28 U.S.C. § 2254(d)(1)).

Strickland clearly established that a tactical decision made by defense counsel after less than complete investigation is reasonable only "to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 691. The Maryland Court of Appeals and the Fourth Circuit departed sharply from *Strickland*'s clear rule in concluding that, in the Fourth Circuit's words, counsel's desire to "avoid[] conflicting arguments supported limited investigation into social history." Pet. App. 23a; *id.* at 121a-122a, 126a (Maryland Court of Appeals). Whatever its force as a reason not to *present*

evidence, the desire to avoid conflicting arguments cannot justify the decision by Wiggins' lawyers to abandon their effort to *investigate* Wiggins' mitigation case. Information Wiggins' lawyers possessed in the Spring of 1989 contained leads suggesting that a powerful mitigation case might be available to them. Any competent attorney would have realized that tracking down those leads was necessary information to make an informed choice among possible defenses, or even to evaluate whether multiple defenses could be used effectively. Wiggins' lawyers, however, failed to follow up on any of those leads, shutting down their efforts at precisely the point when competent capital counsel would have put the mitigation investigation into high gear.

The State does not dispute that Wiggins' counsel would have violated minimum professional standards had they undertaken no investigation into mitigation whatsoever. Nor could such a position be defended. It is self-evident that without conducting any investigation into possible avenues of mitigation, counsel cannot possibly fulfill the bedrock obligation to make reasonable strategic choices about how best to defend a client, much less advise the client competently about available options. *See Williams*, 529 U.S. at 396 (discussing "obligation to conduct a thorough investigation of the defendant's background"). Yet what happened here was worse. Wiggins' lawyers shut down their mitigation investigation *after* obtaining the social services records, even though a reasonable lawyer, having reviewed those records, would have known that further investigation would probably produce a powerful mitigation case. If it would have been unreasonable not to commence the investigation, then it was even more unreasonable to stop the investigation once counsel reviewed the records because the prospect that investigation would yield strong mitigation evidence was significantly better after counsel obtained the records than it was before.

Thus, there is no merit to the State's suggestion that the records were a basis for halting investigation, rather than a

demand to press ahead. *See Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (assessing "what additional leads [counsel] had, and what results he might reasonably have expected from these leads"), *cert. denied*, 123 S. Ct. 963 (2003). There is a world of difference between the clues in those records and the ultimate mitigation case they foreshadowed. For example, the social services records suggest that Wiggins was under severe physical and emotional stress during his years in foster care: he displayed emotional difficulties as he was bounced from one foster home to another, he had a difficult relationship with Mrs. Miner, and he had frequent and lengthy absences from school. Lodging Materials ("LM") 54-95, 126, 131-36, 140, 147, 159-76. The records did not mention that one foster mother repeatedly bit him or that Wiggins for years had been repeatedly sexually molested and raped by his foster father, Mr. Miner. Pet. App. 177a-179a. Nor did they mention that, having escaped the sexual horrors that he had endured at the Miners' residence, he eventually was placed in the Blackwells' home only to be repeatedly gang-raped by the Blackwells' teenage sons. Pet. App. 175a-176a, 190a.

Similarly, while the records describe the single specific instance of neglect that prompted the State to place Wiggins in foster care, LM 159, they do not indicate how frequently or how long Wiggins' mother left her children untended and unfed. Nor do the records describe the squalor, brutality, and depravity of Wiggins' home life - that he lived in filth and picked food from trash cans, that his own mother burned and beat him, that he repeatedly was exposed to his mother having sex in the same bed as the children, and that he repeatedly witnessed the rape and sexual molestation of his sister. Pet. App. 167a-171a. Getting the true picture required following up on the clues the social services records held.

In short, the records provided hints, but only hints, that Kevin Wiggins might well be a person whose life experience would have triggered "the belief, long held by this society, that defendants who commit criminal acts that are attributable

to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (internal quotation marks and citation omitted). Thus, once counsel obtained the records, they could not reasonably limit their investigation into mitigation until they had investigated the clues those records contained. Indeed, it would be perverse to conclude that obtaining these records discharged counsel's obligation to investigate mitigation, for such a ruling would mean that the more the initial steps in an investigation suggest that helpful evidence may be available, the more justifiable it is for counsel to abandon pursuit of that evidence. *Strickland* cannot stand for that absurd proposition. Yet that is precisely what the Fourth Circuit concluded when it held that counsel had rendered adequate performance merely because they were aware of "a *possible* avenue of mitigation." Pet. App. 20a (emphasis added).

The State seeks to avoid this conclusion by dismissing it as the product of inappropriate hindsight. But Wiggins' *Strickland* claim does not center on a *post hoc* showing that trial counsel failed to uncover additional mitigation evidence. Instead, it focuses "on the facts of the particular case, viewed as of the time of counsel's conduct," *Strickland*, 466 U.S. at 690, and evaluates that conduct "from counsel's perspective at the time." *Id.* at 689. It is this test - the very test mandated by *Strickland* - that Wiggins' lawyers fail. Their performance must be judged on the basis of what they knew in the Spring of 1989 after they obtained the social services records. On the basis of the facts they knew then, the decision to truncate investigation into mitigation evidence was not a reasonable professional judgment. Counsel needed to make an informed decision about how best to defend their client against a death sentence. They knew from the social services records that Wiggins could well have had a powerful mitigation case. But they did not know how strong that case would be or of what it would consist. Yet they chose at that point to abandon their

investigation and to focus instead on "retrying the factual case," JA 485, thereby rendering impossible a reasoned decision as to which line of defense was most promising.

Viewing the matter from counsel's "perspective at the time," the "tactical" explanation the State now offers for cutting the mitigation investigation short is neither reasonable as a matter of professional judgment nor plausible as a matter of fact. If, as the State contends, defense counsel's reason for not presenting mitigation evidence about Wiggins' upbringing was the fear that it would undermine the attack on principalship, then they would not have abandoned their investigation into mitigation until the trial judge denied the motion to bifurcate the penalty phase at the outset of the sentencing hearing. Up to that point, Wiggins' lawyers had every reason to build the most powerful mitigation case possible. Yet they did not do so, and consequently had nothing more in hand at sentencing than a patently inadequate psychologist's report on the results of IQ and personality testing that had been given to Wiggins in April 1989.[1] Whether the motion was granted or denied, counsel's failure to investigate left them in no position to inform the jury – or to make a reasoned strategic judgment *whether* to inform the jury – about the aspects of Wiggins "disadvantaged background" that would make him "less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. at 319. It is thus inexplicable that the State would now defend the conduct of Wiggins' lawyers by pointing to Mr. Schlaich's testimony that his sentencing strategy was to

[1] The psychologist, Dr. Stejskal, saw Wiggins on two occasions for the purpose of administering intelligence and personality tests. JA 349. His testimony would have been no substitute for a personal history of the kind contained in the report produced during postconviction proceedings. Indeed, it would have been patently deficient to offer the disembodied diagnosis of a "personality disorder" (which is all the proffer indicated Dr. Stejkal was prepared to offer) without offering the evidence of Wiggins' nightmarish upbringing in order to persuade jurors to view his impairments as reducing his moral culpability and not a matter of his own doing.

"attempt to retry the factual case" and that he was "sure" that he made the decision to follow that course "before the trial on the facts." Resp. Br. at 20 (quoting JA 485-86). Given the approach Wiggins' lawyers actually pursued, it made no sense whatsoever to "limit[] investigation into social history" based on a desire to "avoid conflicting arguments." Pet. App. 23a.

The conclusion that Wiggins' lawyers fell short of the standards established in *Strickland* is fully consistent with the specific facts of *Strickland* itself as well as this Court's decisions applying it. In *Strickland*, counsel made a reasonable judgment to limit additional investigation into mitigation because nothing in the initial investigation provided a reason to think that further investigation might prove fruitful. The Court specifically noted that it was reasonable for defendant's counsel to "surmise from his conversations with respondent that character and psychological evidence would be of little help." 466 U.S. at 699. Similarly, although defendant's counsel in *Strickland* did not interview all of his client's family members, neighbors, and friends, nothing that counsel had learned from his interviews with his client or his conversations with his client's wife and mother – or from any other source – suggested that further investigation would uncover anything like Wiggins' nightmarish life history or other potential mitigation evidence. To the contrary, "affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems." *Id.* at 677. Such evidence "would barely have altered the sentencing profile presented to the sentencing judge." *Id.* at 700. Thus, counsel in *Strickland* had investigated sufficiently to be able to conclude reasonably that further investigation would not yield meaningful mitigation evidence.

The same is true of *Burger v. Kemp*, 483 U.S. 776 (1987). In that case, defense counsel "talked with the [defendant's] mother on several occasions and concluded that her testimony

would not be helpful and might have been counterproductive." *Id.* at 792. The lawyer also interviewed another lawyer who had "acted as [the defendant's] 'big brother,'" and concluded that his testimony "was not helpful" – an assessment the other lawyer shared. *Id.* at 792-93. Counsel's meetings with his client convinced him that Burger would express no remorse if he testified, and his interviews with a psychologist likewise convinced him that the psychologist would disclose on cross-examination that Burger had bragged about the brutality of his acts. To be sure, postconviction counsel had uncovered additional mitigation evidence about Burger's difficult upbringing. As the Court explained, however, the relevant question under *Strickland* was not whether trial counsel might have turned up that evidence had he investigated more thoroughly. Rather, the question was whether counsel's "performance in evaluating the mitigation evidence available to him, and in deciding not to pursue further mitigating evidence" was consistent with prevailing professional standards. *Id.* at 788. The decision on the part of Burger's lawyer to make a less than complete investigation into mitigation was reasonable precisely because he had done a substantial investigation and turned up nothing that was helpful (or that even suggested that further investigation would produce helpful evidence) and much that could have been extremely harmful. Here, in stark contrast, the initial investigation by Wiggins' lawyers uncovered leads suggesting that further investigation might well result in the discovery of powerful mitigation evidence. In this determinative respect, the situation they faced differs fundamentally from the one Burger's lawyer faced.

The other case on which the State places heavy reliance, *Bell v. Cone*, 122 S. Ct. 1843 (2002), is totally inapposite. That case involved no claim that counsel investigated inadequately. Rather, counsel's conduct was challenged under *United States v. Cronic*, 466 U.S. 648 (1984), on the theory that counsel's decision to rely at sentencing on the mental health evidence

admitted at the guilt-innocence phase amounted to a failure to provide any representation at all. The Court rejected the claim on the ground that counsel could reasonably have decided that the jury would remember the mental health evidence (which they had heard just the day before). *Bell v. Cone* thus has no relevance here.[2]

Unlike the lawyers in *Strickland*, *Burger*, and *Bell*, Wiggins' lawyers chose to shut down their investigation into mitigation at the very point when any reasonably competent capital defense counsel would have known that it was imperative to press forward. Their conduct was an obvious violation of *Strickland*'s requirement that decisions to limit investigation must be supported by reasonable professional judgments. The Maryland Court of Appeals applied that established rule of *Strickland* in an objectively unreasonable manner when it reached the opposite conclusion.

B. The Decision of the Maryland Court of Appeals Cannot Reasonably Be Defended on the Ground That Wiggins' Lawyers Knew the Facts of Wiggins' Nightmarish Upbringing.

Wiggins is also entitled to relief under 28 U.S.C. § 2254(d)(2) because the adjudication of his *Strickland* claim by the Maryland Court of Appeals resulted in a decision that is based on an unreasonable determination of the facts.

The Maryland Court of Appeals concluded that Wiggins' lawyers "were aware that [Wiggins] had a most unfortunate childhood." Pet. App. 121a. But the only finding in the Court's opinion which explicates and supports that conclusion

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[2] Similarly, in *Darden*, the Court found no deficient performance where counsel clearly spent a "significant portion" of time preparing for sentencing. *Darden v. Wainwright*, 477 U.S. 168, 184-85 (1986). Moreover, the mitigation evidence was not particularly compelling, and the Court concluded that any rebuttal evidence would have opened the door for the State to produce damaging evidence of the defendant's prior convictions, as well as psychiatric reports concluding that the defendant was a sociopath who would "act entirely on impulse." *Id.* at 186.

was the following: "Mr. Schlaich had available to him not only the presentence investigation report . . . which included some of appellant's social history, but also more detailed social services records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care and borderline retardation." *Id.* In upholding the Maryland Court of Appeals' decision as reasonable in this regard, the Fourth Circuit accepted the Maryland court's finding, indicating that "Schlaich stated that he knew some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen," including the facts that "there were reports of sexual abuse at one of his foster homes; that he had had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded." Pet. App. 20a.

The Maryland Court of Appeals cannot, however, be upheld on that ground because its decision was "objectively unreasonable," and clear and convincing evidence shows that its "factual premise was incorrect." *Miller-El v. Cockrell*, 123 S. Ct. 1029, 1041 (2003). As the State and its supporting *amici* now concede (Resp. Br. at 22 n.9; U.S. Br. at 25), the social services records do not contain what the Maryland Court of Appeals and the Fourth Circuit said they contain. Apart from documenting the specific situation of neglect that led to Wiggins' initial foster care placement, the records do not describe any of the horrifying details of Wiggins' first six years before he was taken from his mother. The records do not recount "instances of physical and sexual abuse."[3] They contain nothing at all about the years of rape and sexual abuse at the hands of Mr. Miner, and nothing about Wiggins being

[3] The state postconviction trial court made the correct factual finding (ignored by the Maryland Court of Appeals) that there was no "mention of abuse against Wiggins in any [social services] report." Pet. App. 142a n.269.

raped by the teenage sons of the Blackwell family.

The social services records themselves provide "clear and convincing" evidence of the state court's error for purposes of 28 U.S.C. § 2254(e)(1). To disprove a factual determination by "clear and convincing" evidence, it must be "highly probable" that the determination was erroneous. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). Here, the error is not merely highly probable; it is certain. The social services records conclusively establish the error of the Maryland Court of Appeals because they do not document Wiggins' physical and sexual abuse. The presumption of correctness established in 28 U.S.C. § 2254(e)(1) is thus easily overcome here. *See generally Miller-El*, 123 S. Ct. at 1041 (federal court may conclude that state court's factual premise was incorrect by clear and convincing evidence). Because the entire factual premise on which the decision of the Maryland Court of Appeals rests is demonstrably incorrect (even granting it the appropriate deference under § 2254(e)(1)), its ultimate decision was based on an "objectively unreasonable" factual determination under § 2254(d)(2). *Miller-El*, 123 S. Ct. at 1041-42.

Unable to rely on the Maryland Court of Appeals' actual findings, the State is forced to improvise. Specifically, the State now suggests that Mr. Schlaich's statement that "at least" he knew the facts as they were "reported in other people's reports," JA 491, was not a qualified claim that he knew only what was in the official reports, but rather an unqualified claim that he knew all the mitigation facts "whatever the source." Resp. Br. at 35. But that self-serving spin on Mr. Schlaich's testimony is no substitute for a state court finding under § 2254, and it merits no deference. It is incorrect in any event. Schlaich was plainly referring to facts as they were "reported" in written "reports"; he was being questioned about the social services records when he made the statement. JA 490. That is precisely how both the Maryland Court of Appeals and the Fourth Circuit understood the testimony. Pet. App. 20a, 121a.

Most importantly, the State's *post hoc* reading of the cold record is completely at odds with the conclusions reached by the state postconviction trial court – the trier of fact who actually heard Mr. Schlaich's testimony, observed his demeanor, and considered all the other evidence. That court specifically stated that "based upon the evidence that I have seen I'm concluding it was error for them not to investigate it" because "I have no reason to believe that they did have all of this information." JA 605-06. The court made that finding in direct response to the State's argument that "whoever was responsible for [mitigation evidence] did develop it" by obtaining social services records, the presentence investigation, and a psychological test. CA App. 1436. The court also noted "I don't ever remember a death penalty case that there was not this social history done. . . . Not to do a social history, *at least to see what you have got*, to me is absolute error. . . . I really don't think that is even a close question." JA 605 (emphasis added). It was thus quite clear to the judge who actually heard the testimony that Mr. Schlaich did not know what he claimed to know about Wiggins' life history in the testimony on which the State now relies.

This contemporaneous finding made by the judge best positioned to assess Mr. Schlaich's demeanor and credibility merits great deference because it lies "peculiarly within a trial judge's province." *Wainwright v. Witt*, 469 U.S. 412, 428 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038-39 (1984). And it is not undermined in the least by the written decision the court issued three years later. Although the court reversed itself and ruled that counsel's performance was not deficient, it did so solely on the basis of its legal conclusion that "when the decision not to investigate . . . is a matter of trial tactics, there is no ineffective assistance of counsel." Pet. App. 155a. This (erroneous) ruling that a tactical decision was *per se* immune from scrutiny under *Strickland*, made the extent of counsel's investigation irrelevant; it did not change the judge's earlier finding that Wiggins' lawyers had never learned the

mitigation evidence documented in the social history.

That Wiggins' lawyers were ignorant of the key mitigation facts is confirmed by their proffer of the evidence they would have introduced had the state court agreed to bifurcate the sentencing proceeding into separate eligibility and mitigation phases. That proffer included *nothing* about Wiggins' history of horrible abuse but consisted solely of a recitation of the conclusions reached by a psychologist on the basis of limited testing. JA 349-51. Had Wiggins' lawyers known the powerful mitigation evidence the State now claims they knew, that evidence surely would have been included in the proffer. Counsel's silence in this regard speaks volumes.

Thus, Wiggins is entitled to relief under § 2254(d)(2) as well as § 2254(d)(1).

II. EVEN APART FROM THEIR UNREASONABLE INVESTIGATION INTO MITIGATION, WIGGINS' LAWYERS PURSUED A PLAINLY UNREASONABLE COURSE AT SENTENCING.

Even if Wiggins' lawyers had conducted the "requisite diligent investigation" into Wiggins' personal history, *see Williams*, 529 U.S. at 536 (O'Connor, J., concurring), their defense at sentencing would still be patently unreasonable. The State contends that Wiggins' lawyers made the reasonable judgment to "concentrate" on a single defense at sentencing. But the State seeks to defend a nuanced tactical judgment that Wiggins' lawyers never made. The justification the State now presses was manufactured years later on the basis of Mr. Schlaich's self-serving testimony during the postconviction hearing, and cannot be squared with the actual record of the sentencing proceeding. Under *Strickland*, however, counsel's performance must be judged only on "the facts of the particular case, viewed as of the time of counsel's conduct," 466 U.S. at 690, and not on *post hoc* rationalizations.

The plain fact is that Wiggins' lawyers did not focus exclusively on the principalship issue at sentencing, and thus

forgoing a powerful case in mitigation cannot be justified on that basis. Wiggins' counsel invited the jury to "consider not only the facts of the crime" but also "who the person is," and they promised that the jury would hear about Wiggins' difficult life," JA 70-72, but then failed to present the mitigation evidence necessary to guide the jury's inquiry. Wiggins' lawyers thus left the jury to assess Wiggins' background and character solely on the basis of the harmful and misleading presentence report they knew would be introduced at sentencing as a matter of law. Compounding that failure, Wiggins' counsel introduced testimony from Dr. Johnson that actually suggested Wiggins might have violent tendencies, *see* Pet. Br. at 6, thus making precisely the point the State contends Mr. Schlaich was trying to avoid.

The effort to disprove principalship was entirely inadequate.[4] Counsel failed to use mitigation evidence that would have bolstered their effort to disprove principalship and would have furthered – not conflicted with – what the State now claims was their strategy. Wiggins' borderline intelligence, for example, would have powerfully reinforced the theme that Wiggins was an impressionable person who easily could have been led astray by others such as the Armstrongs and been a mere accomplice in Ms. Lacs' death. Moreover, by contending that Wiggins did not kill Ms. Lacs, yet doing nothing to dissipate the force of the judge's instructions that Wiggins had already been found guilty of murdering her and that the jury was bound to accept that fact, Wiggins' lawyers effectively sealed their client's fate. Wiggins' lawyers offered the jury no alternative hypothesis as

[4] Contrary to the State's brief, Wiggins does *not* contend that the sentencing judge's instructions that Wiggins had been convicted of murder renders *per se* ineffective Schlaich's pursuit of a principalship defense. *See* Resp. Br. at 41. What Wiggins *does* contend is that, to have any chance of succeeding, Schlaich had to distinguish the two concepts for the jury, and that Schlaich's bungled presentation failed to do just that. *See* Pet. Br. at 44-45. That a number of appellate judges later understood the distinction that Schlaich failed to make clear to the jury is thus of no consequence.

to how Ms. Lacs might have died if Wiggins' did not kill her. They never suggested who other than Wiggins might have been in Ms. Lacs' apartment, or how the murder might have occurred if Wiggins was merely an accomplice and not the principal. The State concedes as much in suggesting that Wiggins' lawyers were pursuing a "residual doubt" strategy.[5]

Thus, even apart from the failure to investigate, Wiggins' lawyers performed far below acceptable professional standards at sentencing.

III. IT FOLLOWS *A FORTIORI* FROM *WILLIAMS V. TAYLOR* THAT WIGGINS SUFFERED PREJUDICE.

The State barely contests prejudice, and makes no effort to distinguish *Williams v. Taylor*, despite its prominence in petitioner's opening brief, and despite the district court's holding that prejudice followed from *Williams* "*a fortiori*." Pet. App. 51a. In *Williams*, this Court held that counsel's failure to investigate and present mitigation evidence had caused

[5] This Court has recognized that "residual" doubt will not be a factor unless the sentencer also decided guilt – and therefore may have doubts left over from trial. *Franklin v. Lynaugh*, 487 U.S. 164, 173 n.6 (1988) (penalty-only jury will not rely on residual doubt); *Lockhart v. McCree*, 476 U.S. 162, 181 (1986). As explained by the very empirical studies the State cites, jurors sometimes negotiate a "compromise" or "trade-off between guilt and punishment," so that those with doubts about guilt agree to convict in exchange for other jurors' promise to reject the death penalty. Margery Malkin Koosed, *Averting Mistaken Executions By Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. Ill. U. L. Rev. 41, 67 (2001); *see also id.* at 43, 70; William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1, 29 (1987-88) (explaining likelihood that jurors "exchanged what should have been votes for a verdict of not guilty, based on reasonable doubt, for a life recommendation at the sentencing phase"); William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476, 1527 (1998) (describing "trade off"). Where, as here, a sentencing jury did not make the guilt-innocence decision, counsel cannot rely on any such "lingering" doubts or "trade-offs." The new sentencing jury "nullified] lingering doubt as a sentencing consideration." Bowers, 83 Cornell L. Rev. at 1546.

Williams prejudice despite overwhelming evidence that Williams had engaged in a life-long "crime spree" that showed he "would continue to be a danger to society." 529 U.S. at 418-19 (Rehnquist, C.J., dissenting). The evidence left undiscovered and unpresented at Wiggins' sentencing hearing was at least as powerful as that at issue in *Williams*, while – in sharp contrast to Williams – Wiggins had no criminal record at all. The State simply has no response to the conclusion of Judge Motz, which the Fourth Circuit did not question, that "Wiggins' mitigation evidence was much stronger, and the State's evidence favoring imposition of the death penalty was far weaker, than the comparable evidence in *Williams*." Pet. App. 51a.

Instead, the State seeks to denigrate the mitigation evidence by making spurious attacks. The State contends that Selvog's testimony would have been suspect because he failed to obey a state law requiring those discovering child abuse to report that abuse to appropriate authorities. Putting aside the fact that the abuser (Mr. Miner) was dead, the State knows full well that Selvog had no such duty. Attorney General Curran (who is counsel in this case) issued an Attorney General opinion in 1990 specifically concluding that Maryland's reporting obligation did not extend to a "mental health provider [] participating in the preparation of a defense to a criminal proceeding." 75 Md. Op. Att'y Gen. 76 (1990). The State also contends that Selvog's testimony might not be admissible in Maryland. This ignores that Selvog testified in this case that he had previously been qualified as an expert in a capital sentencing trial in Maryland and that testimony from licensed social workers is routinely admitted at capital sentencing. *See also* Br. *Amici Curiae* of the National Association of Social Workers, *et al.* at 14-17. The State also asserts that Selvog's conclusions depend solely on Wiggins' own claims about his past. That ignores the record. As the social history makes clear, Wiggins' sister India and aunt Mozelle independently corroborated the horrors of life with

Wiggins' mother, including the episode in which Wiggins' hands were burned as punishment. India also provided much additional corroborating evidence, including descriptions of grossly inappropriate sexual behavior by Mr. Miner. And while Wiggins was the only witness to the sexual abuse against him, it is hardly uncommon for abused children to keep such matters secret. Moreover, medical and school records provide significant evidence that Wiggins was suffering emotional difficulties during the very time he was being abused by Mr. Miner – including severe eating disorders and extraordinary absences from school.

The State further asserts that there was no prejudice because the State could have "give[n] its own interpretation to information contained in the report and . . . counter[ed] Selvog's report with evidence of its own." Resp. Br. at 47. But it is well past time for the State to have made its case. The State had the social services records prior to sentencing, and could have introduced them irrespective of what Wiggins' lawyers did. The State doubtless chose not to do so because the evidence is obviously mitigating, not aggravating.[6] And the State had ample opportunity during the state postconviction evidentiary hearing to demonstrate what harmful evidence it might have introduced in response had Wiggins lawyers' put on a mitigation case. It introduced nothing.

Nor is there any merit to the State's related suggestion that Wiggins' mitigation evidence would hurt him rather than help him. Resp. Br. at 49. The short answer to that argument is that *Williams v. Taylor* forecloses it. The mitigation evidence in *Williams* had far more of a double-edge, 529 U.S. at 396

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[6] The records themselves do not begin to support the portrait of a violent malevolent youth that the State seeks to paint by selectively quoting snippets and taking matters out of context. Despite all he went through, Wiggins had no criminal record and there is no suggestion in the records of the kind of violent propensities that would support a conclusion that he would be a danger to society.

(noting that "not all of the additional evidence was favorable"), yet this Court had no trouble concluding that *Williams* was prejudiced by its exclusion at sentencing because "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded' might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. Indeed, the State's position is tantamount to a contention that prejudice can never be shown on the basis of evidence about a defendant's deprived background because it could always give rise to an inference that such deprivation could make the defendant antisocial as an adult. Wiggins had no prior record at all. and the record evidence contains only the most minor of confrontations. If the failure to investigate and present such evidence is non-prejudicial because it is "double-edged," then there is no remedy for a counsel's incompetence with respect to even the most powerful mitigation evidence.

The bottom line in this case is that, because of counsel's incompetence, the jurors that sentenced Wiggins to death never had a chance to consider mitigation evidence of extraordinary power. They never had a chance to consider the effects of the privation and abuse Wiggins suffered at the hands of his natural mother and foster parents; they never had a chance to consider the effects of the ongoing rape and sexual abuse that Wiggins suffered in foster homes in which the State of Maryland itself had placed him; and they never had a chance to consider the relevance of Wiggins' borderline intelligence. Had the jury considered that evidence, there is far more than a reasonable probability that they would have reached a reasoned moral conclusion that the effects of Wiggins' nightmarish life experience made him "less culpable than defendants who have no such excuse," and thus undeserving of a death sentence. *Penry v. Lynaugh*, 492 U.S. at 319.

CONCLUSION

The decision of the Fourth Circuit should be reversed.

Respectfully submitted,

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No. 02-311

In the Supreme Court of the United States

KEVIN WIGGINS, PETITIONER

v.

SEWALL SMITH, WARDEN, ET AL.

(CAPITAL CASE)

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

The United States will address the following question:

Whether defense counsel rendered ineffective assistance under the Sixth Amendment to the Constitution when counsel elected not to conduct additional investigation of petitioner's background and not to present possibly mitigating evidence of his background at his capital sentencing after determining that the evidence could undercut counsel's strategy of creating doubt that petitioner had actually killed the victim.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the resolution of the question on which the Court granted certiorari, because claims of ineffective assistance of counsel are frequently asserted on collateral review in federal criminal cases. Although this case involves a state prisoner seeking relief under 28 U.S.C. 2254, the Court's decision will likely affect ineffectiveness claims brought by federal prisoners under 28 U.S.C. 2255 as well.

STATEMENT

1. On September 17, 1988, the mostly clothed body of 77-year-old Florence Lacs was found floating in a bathtub in her apartment in Woodlawn, Maryland. She was not wearing underwear and her skirt had been raised to her waist.

Quantities of a household cleaner and bug spray were found in the water. An autopsy showed that Lacs had minor trauma injuries that were consistent with a pre-death struggle and that the actual cause of death was drowning. There were no signs of forced entry, but the apartment had been ransacked. Lacs had last been seen alive on the afternoon of September 15, wearing the same outfit she was wearing when her body was found. Pet. App. 3a-4a, 94a-95a.

Petitioner was employed by a construction firm doing work in Lacs's apartment building at the time of her murder. On September 15, petitioner completed his daily work assignments shortly after 4 p.m. At approximately 5 p.m., petitioner was seen having a conversation with Lacs outside her apartment. At approximately 7:45 p.m., petitioner arrived at his girlfriend's house in Lacs's car. He and his girlfriend then went on a shopping spree, using Lacs's credit cards. Petitioner was arrested several days later while riding in Lacs's car. Pet. App. 5a-6a, 95a-96a.

2. In late 1988, petitioner was charged with capital murder and related offenses. After a bench trial, he was found guilty of all charges. Petitioner then chose to be sentenced by a jury. Pet. App. 6a-8a, 96a-97a; J.A. 28-32.

Under the Maryland capital sentencing scheme in effect at the time of petitioner's sentencing, Md. Ann. Code art. 27, § 413 (1988), a defendant was not eligible for the death penalty unless the State proved beyond a reasonable doubt at trial that the defendant was guilty of murder in the first degree (which includes felony murder, *id.* § 410 (1988)) and then proved beyond a reasonable doubt at sentencing that the defendant was a "principal in the first degree," which means that he was the person who actually carried the murder out, *State* v. *Ward*, 396 A.2d 1041, 1046 (Md. 1978). Before imposing the death penalty, the sentencer was also required to find that there was at least one aggravating circumstance and that the aggravating circumstances outweighed any mitigating circumstances. Md. Ann. Code art. 27, § 413 (1988).

Before sentencing, petitioner filed a motion for bifurcation, requesting that the jury first decide whether he was a principal in the first degree and then, if it found that he was, decide in a separate proceeding what aggravating and mitigating circumstances existed and whether the former outweighed the latter. The basis for the motion was that petitioner was considering offering certain mitigating evidence, but did not wish to present the evidence in the same proceeding in which he was contesting principalship because of the risk that the evidence would make the jury more likely to find that he was a principal. The mitigating evidence that petitioner was prepared to offer was the testimony of a psychologist who had evaluated petitioner and concluded that he had an IQ of 79 and a personality disorder. The trial court denied the motion. J.A. 34-52, 349-351.

At sentencing, petitioner did not present any evidence of mental retardation or mental illness. Pet. App. 8a. Instead, as he had at the trial's guilt phase, petitioner exploited the lack of forensic evidence placing him in the victim's apartment, highlighted the conflicting testimony about the time she was last known to be alive, and presented expert testimony that contradicted the State's evidence about the time of death. J.A. 271-306, 390-401. In summation, petitioner's counsel argued that the State had not proved beyond a reasonable doubt that it was petitioner who "personally put [the victim] in the water" and "personally h[e]ld her there * * * until she drowned," and that it was "at least reasonably possible, if not highly probable, that Florence Lacs died at the hands of someone other than [petitioner]." J.A. 391-392. The jury unanimously found that petitioner was a principal in the first degree (the fact that made him eligible for the death penalty), that the murder was committed in the course of robbing the victim (a statutory

aggravating factor), and that petitioner had not previously been convicted of a crime of violence (a statutory mitigating factor to which the parties had stipulated). Pet. App. 8a, 97a; J.A. 408-409. The jury then unanimously found that the aggravating factor outweighed any mitigating factors and sentenced petitioner to death. *Ibid.*

The Maryland Court of Appeals affirmed petitioner's murder conviction and death sentence, Br. in Opp. App. 1a-31a, with two judges dissenting from the affirmance of the sentence on the ground that the evidence was insufficient to support a finding that petitioner was a principal in the first degree, *id.* at 32a-38a. This Court denied certiorari. 503 U.S. 1007 (1992).

3. a. In January 1993, petitioner sought post-conviction relief in state court. Petitioner raised numerous claims, including the claim that his lawyers had rendered ineffective assistance at sentencing by failing to conduct a complete investigation into his background and failing to present evidence of his background. In support of that claim, petitioner proffered a "social history," prepared by a social worker for use in the post-conviction proceedings, in which the social worker concluded that petitioner had been physically abused by his mother and sister when he was a child, had been removed from his mother because of abuse and neglect, had been sexually molested while in foster care, and was borderline retarded. The social history was based on interviews of petitioner, as well as interviews of some other members of petitioner's family, a review of social-services records, and a review of other records. Pet. App. 163a-198a; J.A. 419-420, 444-445.

At an evidentiary hearing, one of petitioner's trial attorneys testified that he had obtained petitioner's social-services records before sentencing, had been aware that petitioner was abused as a child and had a borderline mental capacity, and had been aware of the potential mitigating

effect of such evidence in a capital case. The testimony showed that counsel had decided that evidence concerning petitioner's childhood and intelligence would not be more fully developed or presented to the jury, because counsel believed that the best way to avoid the death penalty was to create reasonable doubt that petitioner was a principal in the first degree, and believed that evidence of petitioner's background might not only divert jurors' attention but be viewed as inconsistent with an attack on principalship. Pet. App. 136a-139a; J.A. 485-492, 503-508.

The state court denied post-conviction relief. Pet. App. 131a-156a. It rejected petitioner's ineffective-assistance claim on the ground that counsel "had good reasons for the decisions [they] made," even though some might disagree with them. *Id.* at 156a. Because counsel had "made a tactical decision" that "was reasonable," the court held that the decision not to develop and present information along the lines of that in the social history was likewise justifiable. *Ibid.* In so holding, the court observed that one of petitioner's attorneys had previously represented a defendant charged with the murder of an elderly victim, that the defendant had been sentenced to death despite the introduction of evidence that he lived in foster homes and was sexually abused, and that the experience had influenced petitioner's counsel in the assessment of whether petitioner would benefit from presenting similar evidence. *Id.* at 136a-139a.

b. The Maryland Court of Appeals affirmed the denial of post-conviction relief. Pet. App. 92a-128a. Addressing petitioner's argument that the Sixth Amendment imposes a "virtually mandatory duty to investigate mitigating evidence" and that the tactical decision made in this case was "patently unreasonable," the court "reject[ed] the argument in the broad form that it is presented." *Id.* at 123a. As an initial matter, the court observed, petitioner's counsel "*did* investigate and *were* aware of [petitioner's] background,"

albeit not in the same detail as later developed in the social history. *Ibid.* "More important," the court continued, "counsel *does* have leeway in making strategic and tactical decisions about how to present a case at a capital sentencing hearing" and "is *not* required to present every conceivable mitigation defense if, after proper investigation and review, [counsel] concludes that it is not in the defendant's best interests to do so." *Id.* at 123a-124a. The court concluded that it was not constitutionally unreasonable for counsel to have decided "to proceed with what they thought was their best defense" (contesting principalship), and that, because evidence of a "dysfunctional and abused childhood is not always successful," it was "not unreasonable" for counsel "to choose not to distract from their principal defense with evidence of [petitioner's] unfortunate childhood." *Id.* at 126a.

As was the case on direct appeal, two judges dissented. In their view, the evidence that petitioner was a principal in the first degree was insufficient as a matter of law, and his sentence should therefore have been reduced to life imprisonment. Pet. App. 129a-130a.

This Court denied certiorari. 528 U.S. 832 (1999).

4. In August 1999, petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2254 in the United States District Court for the District of Maryland. The district court granted relief. Pet. App. 28a-89a.

After concluding that "no rational trier of fact could have found [petitioner] guilty of murder beyond a reasonable doubt," Pet. App. 44a, the court held that, even if petitioner was properly convicted of murder, he was entitled to have his death sentence vacated, because his counsel rendered ineffective assistance at sentencing, *id.* at 50a-55a. While acknowledging that trial counsel "were aware of some mitigating information about [petitioner's] unfortunate upbringing," the court stated that counsel's "very possession of that

information triggered [an] obligation to conduct a more complete investigation." *Id.* at 53a. In the court's view, the social history offered at the state-court post-conviction proceeding contained "many crucial facts" of a mitigating nature, and "particularly since [petitioner] had no prior criminal record, a tactical decision made by trial counsel in possession of this information not to present a mitigating case would have been virtually inexplicable." *Id.* at 54a-55a. In any event, the court concluded, petitioner's "trial counsel were under a duty to obtain the information necessary to make a reasoned decision and their failure to do so deprived him of effective assistance of counsel." *Id.* at 55a. Because it viewed the state courts' rejection of petitioner's ineffective-assistance claim as being "almost directly contrary" to this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), the district court held that the determination that counsel were not ineffective "involved an unreasonable application of clearly established federal law." Pet. App. 50a.

5. A unanimous panel of the Fourth Circuit reversed. Pet. App. 1a-24a. Applying 28 U.S.C. 2254(d)(1), which allows habeas corpus relief only if it is shown that a state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as established by the Supreme Court of the United States," the court of appeals held that the Maryland Court of Appeals had not acted unreasonably in rejecting petitioner's challenges to the sufficiency of the evidence at trial and the effectiveness of counsel at sentencing, and that the district court had therefore erred in vacating petitioner's conviction and sentence. Pet. App. 10a-24a.

After concluding that the Maryland Court of Appeals' rejection of petitioner's challenge to the sufficiency of the evidence was not only "not unreasonable" but "fully supported by the record," Pet. App. 17a, the court turned to petitioner's ineffective-assistance claim. The court noted

that, although there were "superficial similarities" between *Williams* v. *Taylor* and this case, *Williams*, unlike this case, involved a "complete failure to investigate" that resulted in counsel's failure to discover and present "a wealth of potentially mitigating evidence grounded in Williams' 'nightmarish' childhood." *Id.* at 19a. In such circumstances, the court explained, "counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice." *Ibid.* The court pointed out that *Williams* did "not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case," but merely applied "the rule under *Strickland*" that counsel must have "some knowledge about potential avenues of mitigation" in order to make a decision that can be "fairly characterized as a reasonable strategic choice." *Ibid.* The court believed that the conduct of petitioner's counsel was consistent with that requirement. *Id.* at 20a.

In contrasting the circumstances of this case with those in *Williams*, the court of appeals noted that petitioner's counsel "did know about [petitioner's] difficult childhood," including incidents of neglect, physical abuse, and sexual molestation, and did know that petitioner had borderline mental abilities. Pet. App. 20a. But because petitioner's counsel regarded the State's evidence as "quite flimsy," counsel thought that petitioner's best hope of avoiding the death penalty would be to plant some doubt in the minds of the jurors as to whether petitioner was the actual killer. *Id.* at 21a. And because counsel viewed petitioner's psycho-social history as "problematic in that it tended to conflict with any attack on principalship," counsel decided not to offer evidence regarding petitioner's background. *Ibid.* That "choice between arguments," the court said, is "the very essence of counsel's function in any context." *Id.* at 22a.

Chief Judge Wilkinson and Judge Niemeyer each wrote a concurring opinion. In his concurrence, Chief Judge Wilkinson expressed the view that, while petitioner "very probably committed the heinous offense for which he stands convicted," he could not "say with certainty" that petitioner did so. Pet. App. 24a. But such concerns, Chief Judge Wilkinson went on to say, were matters to be addressed in the clemency process and not by courts. *Ibid.* In his concurrence, Judge Niemeyer said that the adequacy of counsel's representation at sentencing was a "closer call" for him than the sufficiency of the evidence at trial, and suggested that counsel might have been able to "ha[ve] it both ways" by "arguing liability and still * * * maintain[ing] that any sentence of death would be inconsistent with the mitigating circumstances of [petitioner's] miserable upbringing and marginal intelligence." *Id.* at 25a. Judge Niemeyer ultimately concluded, however, that this view "may be only a luxury of hindsight," and that there was "support in the record from which to conclude that [petitioner's] counsel's decision was a tactical one and * * * was not an unreasonable strategy to pursue." *Id.* at 26a.

SUMMARY OF ARGUMENT

Strickland v. *Washington*, 466 U.S. 668 (1984), which governs claims of ineffective assistance of counsel, requires courts to accord a high degree of deference to counsel's performance and to presume that the challenged action or omission had a sound strategic justification. *Strickland* imposes only a general requirement that counsel make objectively reasonable choices; there is no "checklist for judicial evaluation of attorney performance." *Id.* at 688. In this case, defense counsel did not render deficient performance, either in failing to present mitigating evidence or in failing to conduct a further investigation into mitigating evidence. Rather, defense counsel made a strategic choice to concentrate on weaknesses in the state's case for a capital sen-

tence, and that choice was reasonable under *Strickland*'s deferential standard.

A. In *Strickland* and three subsequent cases, *Darden* v. *Wainwright*, 477 U.S. 168 (1986), *Burger* v. *Kemp*, 483 U.S. 776 (1987), and *Bell* v. *Cone*, 122 S. Ct. 1843 (2002), this Court rejected claims that counsel had performed deficiently by not presenting evidence of a defendant's background at his capital sentencing. In each case, the Court found that it was reasonable for counsel to believe that the mitigating evidence could undermine the strategy that counsel had permissibly selected.

At his capital sentencing, petitioner's counsel chose to attack the State's evidence that petitioner himself had carried out the murder of which he was convicted and chose not to offer evidence of petitioner's troubled childhood and low intelligence. A showing that petitioner was not a principal in the first degree in the murder would have precluded the death penalty altogether. Because the evidence that petitioner had carried out the murder was entirely circumstantial, because petitioner had no criminal record, and because fingerprints and hair found at the crime scene did not belong to petitioner, counsel's decision to contest the evidence that petitioner was a principal in the first degree was a sound strategy. Because the jury might have believed that the evidence of petitioner's unfortunate background and low IQ made it more rather than less likely that petitioner himself had carried out the grisly murder, counsel's decision not to present such mitigating evidence was likewise reasonable.

The court of appeals' holding that petitioner's counsel acted reasonably in not presenting evidence of his background is consistent with *Williams* v. *Taylor*, 529 U.S. 362 (2000), the only case in which this Court has found that a failure to offer mitigating evidence at a capital sentencing constituted deficient performance. In *Williams*, counsel

failed to present mitigating evidence because they did not obtain records that documented the defendant's history of abuse. Their inaction was the result, not of a strategic decision, but of a mistaken belief that state law barred access to the records. The failure of counsel in *Williams* to present other mitigating evidence—evidence of the defendant's borderline retardation and better behavior in structured settings—likewise had no strategic justification, because the evidence did not conflict with counsel's tactical decision to focus on the defendant's voluntary confession to the murder.

B. In *Strickland*, this Court made clear that the general standards for evaluating claims of deficient performance apply to counsel's duty to investigate: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." 466 U.S. at 691. In this case, counsel were sufficiently aware of petitioner's background to make a reasonable choice that further investigation was unnecessary in light of the defense strategy selected.

Petitioner's counsel investigated his background and were aware that he was borderline mentally retarded, had been diagnosed with a personality disorder, had been neglected by his alcoholic mother, and had spent most of his childhood in foster homes. There is also evidence that petitioner's counsel were aware that petitioner had been physically abused and sexually molested. In light of the reasonableness of counsel's strategy of contesting principalship; their existing knowledge about petitioner's intelligence, mental health, and family history; and their reasonable conclusion that presenting this type of evidence could undermine their attack on principalship, it was not unreasonable for counsel to decide that there was no need to conduct a further investigation of petitioner's background.

Like his duty-to-present claim, petitioner's duty-to-investigate claim is not assisted by *Williams* v. *Taylor*. In *Williams*, counsel did not conduct *any* investigation of the defendant's background, and counsel's failure to do so was based, not on any tactical consideration, but on a mistaken belief that the defense was not entitled to obtain the records containing the mitigating evidence. In finding that failure deficient, *Williams* applied the long-settled principles of *Strickland* and did not create any heightened or otherwise unique standard for counsel's duty to investigate a capital defendant's background. Nor should any such quasi-mandatory duty be created, because it could divert counsel's resources from pursuing the investigation of what counsel reasonably concludes is the best defense.

ARGUMENT

DEFENSE COUNSEL'S DECISION NOT TO PRESENT EVIDENCE OF PETITIONER'S BACKGROUND AND NOT TO UNDERTAKE A FURTHER INVESTIGATION OF HIS BACKGROUND WAS A REASONABLE STRATEGIC JUDGMENT THAT SATISFIED THE STANDARDS OF THE SIXTH AMENDMENT

The Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence." This Court has long recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland* v. *Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970)). The principles for assessing claims of ineffective assistance of counsel were established in *Strickland* v. *Washington*, which "announced a now-familiar test." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 476 (2000). A defendant making an ineffectiveness claim must show both that counsel's performance was deficient, which

means that "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, and that the deficient performance prejudiced the defendant, which means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Petitioner contends that his counsel performed unreasonably when counsel decided not to present evidence of, or conduct a further investigation into, petitioner's troubled childhood and low intelligence because of the judgment that such evidence could interfere with counsel's strategy of avoiding a death sentence by creating doubt about petitioner's role in the killing. Petitioner's contention should be rejected.[1]

A. Counsel Did Not Perform Deficiently In Deciding Not To Present Evidence Of Petitioner's Background

Petitioner's counsel chose to contest the State's evidence that petitioner was a principal in the first degree (and was therefore eligible for the death penalty) and chose not to offer mitigating evidence concerning petitioner's background (which, if found to outweigh any aggravating circumstances found by the jury, would prevent the imposition of a death sentence). Because these were reasonable strategic decisions, counsel did not perform deficiently.

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[1] Because this case arises on federal habeas corpus, petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance." *Bell* v. *Cone*, 122 S. Ct. 1843, 1852 (2002). Under 28 U.S.C. 2254(d)(1), he "must show that the [Maryland] Court of Appeals applied *Strickland* to the facts of his case in an objectively unreasonable manner." 122 S. Ct. at 1852. "[A]n unreasonable application is different from an incorrect one." *Id.* at 1850. This brief explains why counsel's performance satisfies the Sixth Amendment under *Strickland*. It follows *a fortiori* that, in rejecting petitioner's ineffective-assistance claim, the state court did not apply *Strickland* in an objectively unreasonable manner.

1. *Under* Strickland *v.* Washington, *Courts Are Required To Defer To Counsel's Reasonable Strategic Decisions*

a. Last Term, in *Bell* v. *Cone*, this Court repeated what it first said in *Strickland*: "[j]udicial scrutiny of a counsel's performance must be highly deferential," with "every effort * * * be[ing] made to eliminate the distorting effects of hindsight." 122 S. Ct. at 1852 (quoting 466 U.S. at 689). Since it is "all too tempting" for a convicted defendant to "second-guess counsel's assistance" and "all too easy" for a court to find an act or omission "unreasonable" because it was "unsuccessful," *Strickland*, 466 U.S. at 689, courts "must indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance," *Cone*, 122 S. Ct. at 1854 (quoting *Strickland*, 466 U.S. at 689). That means that a defendant alleging that his lawyer's performance was constitutionally deficient "must overcome the 'presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."'" *Id.* at 1852 (quoting *Strickland*, 466 U.S. at 689, quoting *Michel* v. *Louisiana*, 350 U.S. 91, 101 (1955)).

Related to *Strickland*'s principle that courts must defer to an attorney's reasonable decisions, and no less fundamental, is the Court's firm rejection of any kind of "checklist for judicial evaluation of attorney performance." *Strickland*, 466 U.S. at 688. Any "set of detailed rules for counsel's conduct" could not account for "the variety of circumstances faced by defense counsel" and would both "restrict the wide latitude counsel must have in making tactical decisions" and "interfere with the constitutionally protected independence of counsel." *Id.* at 688-689. As this Court reiterated three Terms ago in *Roe* v. *Flores-Ortega*, "the Federal Constitution imposes [only] one general requirement: that counsel make objectively reasonable choices." 528 U.S. at 479. Beyond this, "[m]ore specific guidelines are not appropriate." *Strickland*, 466 U.S. at 688.

b. In four different cases, this Court has found that counsel did not perform deficiently in deciding not to present evidence of a defendant's background at his capital sentencing. In each case, the Court concluded that it was reasonable for counsel to believe that the mitigating evidence could undermine the strategy that counsel had reasonably decided upon.

In *Strickland* itself, counsel's strategy for avoiding the death penalty was to rely on the defendant's "remorse and acceptance of responsibility" and to argue, based solely on statements made at the guilty plea colloquy, that the defendant had "committed the crimes under extreme mental or emotional disturbance." 466 U.S. at 673-674. Having settled on that strategy, counsel "decided not to present * * * evidence concerning [the defendant's] character and emotional state." *Id.* at 673. This Court held that counsel's "strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on [the defendant's] acceptance of responsibility for his crimes" was "well within the range of professionally reasonable judgments." *Id.* at 699. Indeed, the Court concluded that "there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment." *Ibid.* The Court deferred to counsel's decision to rely on the defendant's acceptance of responsibility because the sentencing judge's "views on the importance of owning up to one's crime's were well known," and it deferred to counsel's decision not to present evidence because the tactic "ensured that contrary character and psychological evidence * * * would not come in." *Ibid.*

The Court has taken the same deferential approach in three subsequent cases. In *Darden* v. *Wainwright*, 477 U.S.

168 (1986), the Court upheld the reasonableness of counsel's strategy "to rely on a simple plea for mercy from the [defendant] himself," *id.* at 186, and not to present mitigating evidence, *id.* at 184, concluding that counsel might reasonably have believed that any effort to suggest that the defendant was not violent and could not have committed the crimes at issue would have opened the door to devastating rebuttal with his prior convictions and psychiatric evidence, *id.* at 186. In *Burger* v. *Kemp*, 483 U.S. 776 (1987), the Court sustained defense counsel's decision to rely on a strategy of showing that a co-defendant had exerted influence over the defendant's will, *id.* at 793, and not to present any "mitigating evidence at all," *id.* at 788, even though there was evidence that the defendant "had an IQ of 82 and functioned at the level of a 12-year-old child," *id.* at 779. The Court deferred to counsel's judgment that presenting such evidence would have exposed the defendant to evidence of his lack of remorse, and that seeking to show that he had a "troubled family background" could have revealed his "violent tendencies" and brushes with the law, which were "at odds" with the chosen strategy. *Id.* at 793. In *Bell* v. *Cone*, the Court held that the state court was not "objectively unreasonable" under 28 U.S.C. 2254 in sustaining, under *Strickland*, counsel's strategic judgment not to present mitigating evidence at sentencing, and instead to rely on evidence adduced at the guilt stage that his offense could have been influenced by his military service and use of drugs. 122 S. Ct. at 1848, 1853. The Court held that sound trial tactics made it reasonable to do so, since the defendant himself might have "lash[ed] out" on the witness stand and calling other witnesses might have allowed the prosecution to elicit his criminal history. *Id.* at 1853.

2. *The Decision Not To Present Evidence Of Petitioner's Background Was Strategically Reasonable*

Petitioner's counsel's strategy at sentencing was eminently reasonable.

a. In counsel's judgment, petitioner's best hope for avoiding the death penalty was to contest principalship—to argue that, although petitioner was guilty of felony murder, the State could not meet its burden of proving that he was the one who had actually carried the murder out. This strategy is similar to the strategy of appealing to jurors' "residual doubts"—the "doubts that may have lingered in the minds of jurors who were convinced of [the defendant's] guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt." *Franklin* v. *Lynaugh*, 487 U.S. 164, 187 (1988) (O'Connor, J., concurring in the judgment). This Court has observed that "residual doubt has been recognized as an extremely effective argument for defendants in capital cases," *Lockhart* v. *McCree*, 476 U.S. 162, 181 (1986) (internal quotation marks omitted), and one study has suggested that "doubt involv[ing] the defendant's level of participation in the murder" plays an even greater role than "residual doubt" in influencing a jury's sentencing decision, Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L. Rev. 1557, 1580 (1998). In the context of the sentencing scheme at issue here, it is certainly the case that, other things being the same, creating doubt about the defendant's role was even more likely to prevent a death sentence than creating doubt about his guilt. That is because, while "residual doubt" is merely a mitigating circumstance that would be weighed against any aggravating circumstances and might or might not lead to a sentence of life, see Md. Ann. Code art. 27, § 413(g)(8) (1988), successfully contesting principalship would necessarily prevent a

sentence of death by making the defendant ineligible for it, *id.* § 413(e)(1) (1988).

In short, if "residual doubt" is ordinarily a good strategy, contesting principalship is an even better one, assuming the circumstances justify it. And the circumstances justified it here. Counsel could convincingly attack the State's case that petitioner had carried out the killing himself, both because the evidence of principalship was entirely circumstantial—there were no eyewitnesses, petitioner did not confess, and there was no forensic evidence tying petitioner to the murder—and because, as the jury learned, petitioner had no history of violence. Indeed, counsel could plausibly argue not only that the evidence did not prove that petitioner had carried out the killing, but that it affirmatively showed that someone other than petitioner had done it, because police found fingerprints and hair at the crime scene that were not petitioner's. Pet. App. 4a. The reasonableness of counsel's strategy is confirmed by the fact that two judges of the Maryland Court of Appeals, on both direct and collateral review (Br. in Opp. App. 32a-38a; Pet. App. 128a-130a), concluded that the evidence of petitioner's principalship was insufficient under the Maryland rule that a conviction based solely on circumstantial evidence "is not to be sustained unless the circumstances are inconsistent with any reasonable hypothesis of innocence." Br. in Opp. App. 33a (internal quotation marks omitted). Given the evidence, counsel's strategy to contest principalship can hardly be considered "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Compare *Baker* v. *Corcoran*, 220 F.3d 276, 296 n.17 (4th Cir. 2000) (reasonable to contest principalship because "[t]he evidence that [the defendant] shot [the victim] was not overwhelming"), cert. denied, 531 U.S. 1193 (2001), with *Evans* v. *Smith*, 220 F.3d 306, 319 (4th Cir. 2000) (reasonable *not* to contest principalship because of "the state's strong evidence that [the

defendant] was the shooter"), cert. denied, 532 U.S. 925 (2001).

b. Counsel were also within the range of professionally competent assistance when they ultimately decided not to present evidence of petitioner's low intelligence and troubled childhood. As this Court has observed, evidence of "mental retardation and history of abuse" is a "two-edged sword," because "it may diminish [the defendant's] blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Penry* v. *Lynaugh*, 492 U.S. 302, 324 (1989), overruled on other grounds by *Atkins* v. *Virginia*, 122 S. Ct. 2242 (2002).[2] As counsel recognized, not only can such evidence increase the likelihood of a finding of future dangerousness in a case where that is alleged to be an aggravating circumstance, it can also increase the likelihood of a finding that the defendant himself carried out the murder in a case, like this one, where principalship must be proved. That risk is particularly great in a case, like this one, in which the murder was grisly. Petitioner's troubled background and low intelligence could have provided the jury with an explanation of why a person would have pulled a 77-year-old woman's skirt up to her waist and sprayed her with insecticide before drowning her in her bathtub.

In an effort to place themselves in a position where they could both contest principalship and present evidence of

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[2] Courts of appeals routinely rely on the "double-edged" nature of a defendant's troubled background in rejecting claims that counsel provided ineffective assistance by not presenting evidence of that type at a capital sentencing. See, *e.g.*, *Harris* v. *Cockrell*, 313 F.3d 238, 244 (5th Cir. 2002); *Crawford* v. *Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *Bryan* v. *Gibson*, 276 F.3d 1163, 1178 (10th Cir. 2001); *Bacon* v. *Lee*, 225 F.3d 470, 481 (4th Cir. 2000), cert. denied, 532 U.S. 950 (2001); *Gerlaugh* v. *Stewart*, 129 F.3d 1027, 1035 (9th Cir. 1997), cert. denied, 525 U.S. 903 (1998); *Jones* v. *Page*, 76 F.3d 831, 846 (7th Cir.), cert. denied, 519 U.S. 951 (1996); *Sidebottom* v. *Delo*, 46 F.3d 744, 754 (8th Cir.), cert. denied, 516 U.S. 849 (1995).

petitioner's background, without running the risk that the mitigating evidence would be viewed by the jury as proof of principalship, petitioner's counsel requested a bifurcated sentencing, in which principalship would be decided during the first phase and, if it was proved, aggravating and mitigating circumstances would be found and weighed during the second phase. J.A. 34-52. It was only after their bifurcation motion was denied that counsel decided not to present evidence of petitioner's background. In view of counsel's reasonable belief that contesting principalship was the best way to avoid a death sentence, their reasonable belief that simultaneously presenting evidence of petitioner's background could undermine that strategy, and the trial court's decision that thwarted their effort to present the evidence separately, counsel cannot be said to have acted unreasonably in deciding not to present the evidence at all.

c. Petitioner contends that counsel could have contested principalship and offered the evidence of his background in the same proceeding. Quoting the district court (Pet. App. 55a n.17), petitioner asserts (Br. 41) that, "[f]ar from conflicting with an effort to disprove principalship," the facts concerning his low intelligence and troubled childhood "could have been 'mesh[ed] . . . into an effective argument that [petitioner] had been made the pawn of others who were responsible for the murder.'" It may well be true that this strategy "could have been" adopted. *Ibid.* But any suggestion that this approach was the only reasonable one is at odds with *Strickland*'s fundamental teaching that "[t]here are countless ways to provide effective assistance in any given case," and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689.[3]

[3] Petitioner also contends (Br. 29, 37-41) that counsel's strategy not to present mitigating evidence was unreasonable because the sentencing jury would receive some information about petitioner's past from a pre-

3. Williams *v.* Taylor *Does Not Control Petitioner's Duty-To-Present Claim*

Williams v. *Taylor*, 529 U.S. 362 (2000), is the only case in which this Court has found that counsel's failure to offer evidence of a defendant's background at a capital sentencing constituted deficient performance. In *Williams*, counsel's strategy was to rely on the fact that the defendant had initiated contact with the police himself and voluntarily confessed to the murder. *Id.* at 369. Because counsel did not obtain the defendant's juvenile and social-services records, counsel was not aware of and therefore did not present evidence that the defendant "had been severely and repeatedly beaten by his father," that his parents had "been imprisoned for the criminal neglect of [the defendant] and his siblings," or that the defendant had spent time in "an abusive foster home." *Id.* at 395. Counsel also failed to present "available evidence" that the defendant was "borderline mentally retarded," *id.* at 396 (internal quotation marks omitted), and that his "conduct had been good in certain structured settings * * * (such as when he was incarcerated)," *id.* at

sentence report that painted an "innocuous" portrait (Br. 29), which, in petitioner's view, should have been rebutted, and because counsel told the jury that "they would present evidence of his 'difficult life' and then failed to do so" (*ibid.*). The fact that the presentence report did not fully reveal petitioner's background, however, did not obligate defense counsel to inject evidence into the case that they reasonably believed would undercut their strategic decision to attack principalship. Nor did counsel's passing comment in her opening statement that "[y]ou're going to hear that Kevin Wiggins has had a difficult life" and that "[i]t has not been easy for him" (J.A. 72) implicitly forecast that the defense would present a full-blown mitigation case. Rather, counsel's comment was made in the context of the broader point that petitioner had "tried to be a productive citizen," had "reached the age of 27 with no convictions," and was "not a man who spent his life in and out of prison." *Ibid.* This point in fact reinforced the attack on principalship that formed the heart of the defense, and was echoed both in the presentence report (J.A. 17-24) and in petitioner's allocution to the jury (J.A. 407-408).

415 (opinion of O'Connor, J.) (internal quotation marks omitted). Petitioner places great reliance on *Williams*, but there is a fundamental distinction between this case and that one: the fact that there was a valid strategic reason for not presenting evidence here, but none there.

At the post-conviction hearing in *Williams*, one of his lawyers testified that he had failed to obtain the records that contained mitigating information about the defendant's background, not "because he thought they would be counterproductive," but "because [he] erroneously believed that state law didn't permit it." 529 U.S. at 373 (internal quotation marks omitted). Indeed, the lawyer acknowledged that information about the defendant's childhood "would have been important in mitigation." *Ibid.* In finding counsel's performance deficient, this Court thus relied on the fact that counsel's failure to offer the mitigating evidence of childhood abuse was not based on "any strategic calculation." *Id.* at 395.

Counsel's failure to present the other mitigating evidence in *Williams*—evidence of the defendant's borderline retardation and improved behavior in structured settings—likewise had no strategic justification. While counsel in this case could reasonably have believed that presenting evidence of petitioner's troubled childhood and low IQ would increase the risk that the jury would find that he had personally carried out the murder of which he was convicted, counsel in *Williams* could not reasonably have believed that presenting evidence of childhood abuse, low intelligence, and adaptability to structured settings would undercut their decision to rely on the defendant's confession as a manifestation of his contrition. As the Court observed, "the failure to introduce the * * * voluminous amount of evidence that * * * [spoke] in [the defendant's] favor was not justified by a tactical decision to focus on [the] voluntary confession." 529 U.S. at 396.

Petitioner is thus mistaken in his contention (Br. 42) that, "[i]f the mitigation evidence available in this case is 'double-edged,' then no defendant could ever successfully pursue an ineffectiveness claim for failure to present mitigation evidence." Counsel's decision not to offer mitigating evidence in this case was reasonable because the evidence could have undermined the strategy that counsel reasonably believed was best. As *Williams* demonstrates, the result may be different when the mitigating evidence could not have undermined counsel's chosen strategy and there was no other valid strategic justification for not presenting it.

B. Counsel Did Not Perform Deficiently In Deciding Not To Conduct A Further Investigation Of Petitioner's Background

Petitioner contends that his counsel had no basis for preferring the strategy of attacking principalship to the strategy of presenting mitigating evidence, because counsel did not fully investigate his background before making the decision. Like the decision not to present evidence of petitioner's background, counsel's decision not to conduct a further investigation of his background was reasonable under the circumstances of this case. Counsel's performance was therefore not deficient.

1. Strickland's *Requirement That Courts Defer To Counsel's Reasonable Decisions Applies To Decisions Not To Conduct An Exhaustive Investigation*

In *Strickland*, after setting forth the general standards for evaluating claims of deficient performance, this Court discussed the application of those standards to "counsel's duty to investigate." 466 U.S. at 690. The Court stated that the general standards "require no special amplification," *ibid.*, because the duty to investigate is governed by the same basic requirement of reasonableness: "In any ineffectiveness case, a particular decision not to investigate must

be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments," *id.* at 691. That means that, while strategic choices "made after thorough investigation of law and facts" are "virtually unchallengeable," strategic choices "made after less than complete investigation" are likewise reasonable so long as "reasonable professional judgments support the limitations on investigation." *Id.* at 690-691. Counsel thus has a duty either "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

In both *Strickland* and *Burger* v. *Kemp*, in addition to rejecting a challenge to counsel's decision not to present evidence concerning the defendant's background (see pp. 15-16, *supra*), this Court rejected a challenge to counsel's decision not to conduct a further investigation of his background. In both cases, the Court relied on the fact that counsel had chosen a reasonable strategy for avoiding a death sentence and had reasonably concluded that the presentation of mitigating evidence would not improve the defendant's chances. See *Strickland*, 466 U.S. at 699 (counsel's strategic decision to rely on defendant's acceptance of responsibility and argue that he had acted under extreme emotional distress was "well within the range of professionally reasonable judgments," and his "decision not to seek more character or psychological evidence than was already in hand" was "likewise reasonable"); *Burger* v. *Kemp*, 483 U.S. at 794-795 (although record "suggest[s] that [counsel] could well have made a more thorough investigation than he did," there was "a reasonable basis for [counsel's] strategic decision that an explanation of [the defendant's] history would not have minimized the risk of the death penalty," and "[h]aving made this judgment, he reasonably determined that he need not undertake further investigation * * * [concerning the defendant's] past").

2. *The Decision Not To Conduct A Further Investigation Of Petitioner's Background Was Reasonable*

Petitioner's counsel acted reasonably in deciding not to conduct a further investigation of his background.

a. In affirming the denial of post-conviction relief, the Maryland Court of Appeals found that, while petitioner's trial counsel did not have "as detailed or graphic a history" as was prepared for the post-conviction proceedings, counsel "*did* investigate and *were* aware of [petitioner's] background." Pet. App. 123a. That finding is supported by the record. See 28 U.S.C. 2254(e)(1). Before sentencing, counsel arranged for petitioner to be evaluated by a psychologist, who determined that petitioner had an IQ of 79, had "difficulty coping" and became "anxious and confused in demanding situations," and had a "psychiatric/psychological diagnosis of personality disorder" with "features of borderline paranoid personality." J.A. 349-351. Petitioner's counsel also obtained his social-services records, J.A. 490, which reflected that petitioner had been removed from his home at age five after being "very, very neglected" by his alcoholic mother (Lodging Material 49); that he had lived in a series of foster homes until he was 18; that he had left one of those homes at 16 because his foster mother physically disciplined him with "something other than her hands" (J.A. 72); and that he suffered from borderline mental retardation. According to the testimony of one of petitioner's trial attorneys at the post-conviction hearing, counsel were also aware before sentencing that petitioner had been physically and sexually abused. J.A. 490-491.

In light of the reasonableness of counsel's strategy of contesting principalship; their existing knowledge about petitioner's intelligence, mental health, and family history; and their reasonable conclusion that presenting this type of evidence could undermine their attack on principalship, it

was not unreasonable for counsel to decide that there was no need to conduct any further investigation of petitioner's background, including the preparation of a social history. When capital defense counsel has a valid strategy for avoiding a death sentence, has investigated enough to have a general understanding of the potentially mitigating features of the defendant's background, and then decides that presenting evidence of the defendant's background will undermine the chosen strategy, counsel has made "reasonable investigations" and "reasonable decision[s] that make[] [further] investigations unnecessary." *Strickland*, 466 U.S. at 691.

b. Petitioner contends (Br. 33-36) that this Court should not defer to the Maryland Court of Appeals' finding that counsel were aware of petitioner's background, at least insofar as the finding was based on the testimony of petitioner's attorney that he knew about the physical and sexual abuse described in the social history, because he testified that his knowledge of those facts was based on the social-services records and the records do not in fact reflect petitioner's abusive treatment. While it is true that the social-services records do not indicate that petitioner was physically abused by his mother or sexually molested by others, it is not clear that petitioner's attorney testified that the records were the source of his knowledge.[4] If counsel had some other source

[4] In response to questioning from petitioner's post-conviction counsel, petitioner's trial attorney testified that petitioner's placement in foster care was reflected in the social-services records (a fact that is indisputably true) and that petitioner's borderline mental retardation had been "reported in other people's reports" (another fact that is indisputably true). J.A. 490-491. In between those two statements, petitioner's attorney answered "[y]es" in response to three questions: whether he had been aware of reports of sexual abuse at one of petitioner's foster homes, whether he had been aware that petitioner's hands were burned by his mother, and whether he had been aware that petitioner's Job Corps supervisor had made sexual advances. J.A. 490-491. But the witness was not asked to and did not reveal the source of his knowledge of those facts.

(petitioner himself, for example), petitioner could not very well maintain that his trial counsel had not been aware before sentencing of the facts set forth in the social history. But even if petitioner's trial attorney was mistaken, and in fact had not been aware of the physical and sexual abuse described in the social history, petitioner's failure-to-investigate claim is at best a claim that trial counsel should have arranged for petitioner to be interviewed by a social worker, because the social worker who prepared the social history obtained the information about the abusive treatment of petitioner that was not documented in the social-services records almost entirely from petitioner himself. See Pet. App. 167a-171a, 177a-179a, 183a, 190a, 192a-193a.

The difficulty with any claim that petitioner's trial counsel performed deficiently by not arranging for petitioner to be interviewed by a social worker is that petitioner was interviewed by a psychologist. After conducting clinical interviews, reviewing the social-services records, reviewing transcripts of interviews of petitioner's family members, and performing six different psychological tests, the psychologist concluded that petitioner had a low IQ and personality disorder and rendered opinions as to how those conditions affected petitioner's behavior. J.A. 349-351; State Ct. R. 440-441. As the evidence at the post-conviction hearing showed, a social worker of the type who prepared petitioner's social history cannot perform objective psychological tests and must rely to a large degree on information provided by the person whose social history he is preparing—in this case, a person seeking to have his death sentence overturned. J.A. 417-418, 425-427, 432-433. Particularly since counsel had formed a reasonable belief that evidence of the defendant's background could undermine their strategy for avoiding a death sentence, it was reasonable for them to

decide that petitioner need not be interviewed by a social worker after having already been interviewed by a psychologist. Compare *Gudinas* v. *State*, 816 So. 2d 1095, 1103-1109 (Fla. 2002) (reasonable not to hire social worker when counsel hired psychologist and physician who evaluated capital defendant and testified about his intelligence and mental condition), with *People* v. *Ganus*, 706 N.E.2d 875, 877-880 (Ill. 1998) (reasonable not to hire psychologist when counsel hired "mitigation specialist" who prepared and testified about capital defendant's social history), cert. denied, 528 U.S. 829 (1999).

3. Williams *v.* Taylor *Does Not Control Petitioner's Duty-To-Investigate Claim*

The court of appeals' conclusion that petitioner's counsel acted within the range of competence demanded of criminal defense attorneys in deciding not to undertake a fuller investigation of his background is consistent with *Williams* v. *Taylor*. In *Williams*, the Court found capital defense counsel's representation deficient because, among other things, they had "failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood." 529 U.S. at 395. But petitioner's duty-to-investigate claim is not controlled by *Williams* for the same reason that his duty-to-present claim is not controlled by that case (see pp. 21-23, *supra*): the fact that there was a tactical reason here, but none there, for counsel's inaction.

Petitioner's counsel *did* investigate his background; unlike counsel in *Williams*, for example, they obtained petitioner's social-services records. But they did not conduct a full-blown investigation, because they believed that the best chance of avoiding a death sentence was to challenge principalship and that presenting evidence of petitioner's background could make it more rather than less likely that the jury would find that he was a first-degree principal. In

Williams, by contrast, counsel conducted *no* investigation of the defendant's background, and their failure to do so was based, not on "any strategic calculation," but on a mistaken belief that "state law barred access to [the] records" containing the mitigating evidence. 529 U.S. at 395. Far from having made a tactical decision not to offer the evidence, counsel in *Williams* acknowledged that information about the defendant's background "would have been important in mitigation." *Id.* at 373.

According to petitioner (Br. 24), *Williams* stands for the proposition that counsel's failure to conduct "a thorough investigation for mitigating evidence" constitutes deficient performance "absent an extremely strong reason for believing such an investigation unwarranted." *Williams* announced no such rule. In that case, the Court applied the long-settled standards of *Strickland*, see 529 U.S. at 390-399; *id.* at 413-416 (opinion of O'Connor, J.), which, like *Williams*, involved "counsel's duty to investigate." 466 U.S. at 690. In *Strickland*, far from adopting a unique standard for that duty, the Court stated that, "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* at 691. That is the same standard that applies to any other decision by counsel. And far from adopting an "extremely strong" presumption that a lawyer who does not conduct a "thorough investigation" for mitigating evidence has performed deficiently (Pet. Br. 24), the Court made clear in *Strickland* that the only presumption in ineffective-assistance cases is the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689.

Because "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation" but "simply to ensure that criminal

defendants receive a fair trial," *Strickland*, 466 U.S. at 689, this Court has "consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation," *Roe* v. *Flores-Ortega*, 528 U.S. 470, 481 (2000). There would therefore be no constitutional basis for the mechanical rule suggested by petitioner even if it were likely to lead to better representation. But it is by no means clear that it would. Requiring more investigation than is reasonable under the circumstances would in many cases cause counsel to devote their energies and resources to investigating the defendant's background even though their time would be better spent developing some other defense. Such a rule would "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause," *Strickland*, 466 U.S. at 689, with the result that a rule intended to benefit criminal defendants would often work to their detriment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

Kevin Wiggins,

Petitioner,

v.

Sewall Smith, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Association of Social Workers (NASW) is a professional membership organization comprised of more than 150,000 social workers with chapters in every state, the District of Columbia, and internationally. Established in 1955, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. Among its activities in furtherance of its purposes, NASW promulgates professional standards and criteria, conducts research, publishes books and studies of interest to the profession, provides continuing education and enforces the NASW *Code of Ethics*. NASW has adopted a Policy on Mental Health affirming the Association's commitment to take a lead in influencing public policy on mental health issues and to educate the public about mental health as a means of fostering prevention and intervention. NASW's participation in this case furthers NASW's policy on mental health issues.

The National Association of Black Social Workers is a national organization founded in 1968 with an active membership of 5000 social work practitioners, professors, and scholars. Its primary focus is the preservation of the Black family, an objective which is augmented and supported by the work of various committees, including those in the area of criminal justice.

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[1] Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. A portion of Part I of the Argument (*infra* at 10-12) is substantially derived from the Brief *Amici Curiae* of the National Association of Social Workers *et al.* filed in *In re Adoption/Guardianship No. CCJ14746 in the Circuit Court for Washington County*, 759 A.2d 755 (Md. 2000).

STATEMENT

In October 1988, the state indicted petitioner Kevin Wiggins in the Baltimore County, Maryland Circuit Court on charges of first-degree murder, robbery, theft, and burglary, and announced its intention to seek the death penalty. Petitioner opted to have his guilt tried by the judge, who found him guilty of first-degree murder, robbery, and two counts of theft in August 1989.

Petitioner opted to be sentenced by a jury. His counsel, however, introduced *no* mitigating evidence regarding petitioner or his background. In particular, although petitioner's trial counsel knew that the Maryland Public Defender's Office routinely retained expert forensic professionals to prepare social histories of capital defendants, and that funds were available for that purpose, petitioner's counsel did not secure a social history for petitioner. Petitioner's counsel was thus unaware of the scope of the available evidence in assessing and determining a strategy for sentencing.

Instead, petitioner's counsel later testified, he focused on "retrying" petitioner's guilt at sentencing, urging the jury – which was repeatedly instructed that petitioner had already been convicted of first-degree murder – to reach the "stunning conclusion that * * * [it] can't be sure beyond a reasonable doubt that Kevin Wiggins *had any role at all* in the [victim's] murder." JA 391 (emphasis added). In response, the prosecution again emphasized that petitioner had already been convicted of first-degree murder, and that the jury was obligated to consider petitioner's crime and "weigh that * * * against what you know about his background" (*id.* 407) – which, because petitioner's counsel had failed to introduce mitigating evidence regarding that background, was only the stipulated fact that petitioner had no prior convictions. Not surprisingly, petitioner was sentenced to death.

In 1993, after exhausting his direct appeal, petitioner sought post-conviction relief in the state trial court. Pet. App. 31a-32a. Post-conviction counsel established that the mitigating evidence regarding petitioner's background that petitioner's counsel could have developed, but did not, would have painted a compelling case to the jury. In particular, post-conviction counsel submitted a social history prepared by Hans Selvog, a licensed clinical social worker with a bachelor's and master's degree. *Id.* 139a & n.264. Based on interviews with petitioner, his three sisters, his maternal aunt, and maternal cousins, as well as a review of foster care, medical, and school records (*id.* 140a), the social history compiled by Mr. Selvog detailed petitioner's dysfunctional upbringing, the repeated and horrific neglect and abuse suffered by petitioner throughout his childhood, and the results of various psychological and physical evaluations of petitioner:

Petitioner's Dysfunctional Upbringing. Petitioner is the product of his mother's extramarital affair with another married man. Petitioner has never met his biological father, and "has only limited knowledge of [him]." Pet. App. 163a. Petitioner's mother – who was herself abused as a child – was addicted to alcohol and never held a job. *Id.* 165a. Once, while intoxicated, she left petitioner's younger sister – who was then two years old – in a taxicab. *Id.* 164a. Petitioner's mother frequently left her four children for "days and weeks at a time" with only petitioner's oldest sister, India (who is three years older than petitioner), to care for them. *Id.* 165a. During the frequent and lengthy absences of petitioner's mother, India was sexually abused by a family friend. Petitioner was aware of the abuse and "felt bad that he couldn't do anything to help" her; although petitioner's mother was also informed of the abuse, she refused to believe India. *Id.* 171a. When petitioner's mother was at home, she would sometimes have sexual intercourse in the same bed in which petitioner and his siblings were sleeping. *Id.*

Neglect and Malnourishment. While residing with their mother, petitioner and his siblings were severely neglected and malnourished. Before abandoning her children "for two to three weeks at a time," petitioner's mother would lock the children out of the kitchen, leaving them to fend for themselves. Pet. App. 166a. At these times, petitioner's sister India would try to find any money hidden in the house to purchase food for her siblings; the children subsisted primarily on junk food and rice, which India cooked on the heater or radiator in bowls or pans hidden in anticipation of her mother's absence. *Id.* When India could not find money to purchase food, she would attempt to obtain food from neighbors or relatives, by panhandling, or by searching through trashcans. *Id.* Petitioner recalls that on some occasions, when the siblings had no food for days, he "ate paint chips from the window sill and drank water." *Id.* 167a. If petitioner's mother returned home and found that her children had entered the kitchen, she was "very abusive." *Id.* The apartment in which petitioner's family resided was "continually filthy." *Id.* 172a.

Physical Abuse By Petitioner's Mother. Petitioner's mother frequently beat her children. Pet. App. 167a-171a. On one occasion, after petitioner accidentally set the family's curtains on fire, petitioner's mother – who was intoxicated – held petitioner's hands against the hot metal grates of the family's gas stove. When petitioner did not stop crying, he was then beaten with a belt. As a result of his injuries, petitioner was hospitalized for a week; he recalls that although his hands (which were "in a cast suspended above his head") hurt, hospital employees were nice to him and "[t]he food was good." *Id.* 167a-171a.

Physical and Sexual Abuse While in Foster Care and the Job Corps. When petitioner was six, he and his siblings were placed in their first foster home, where they remained for approximately one year. They were removed from this home,

however, after it was discovered that their foster mother was physically abusing them. Pet. App. 175a-176a.

Petitioner remained in his second foster home for nine years. Petitioner's second foster mother, Lenore Miner, disciplined the children by beating them with her fists, belts, or switches. Petitioner was also repeatedly sexually molested by his foster father, Charles Miner, but petitioner recalls that at the time he harbored mixed feelings about Mr. Miner because he was "starved for attention": "I wanted a father and mother real bad." Pet. App. 177a. At the same time that Mr. Miner began to molest petitioner, however, petitioner also became unable to eat; he was then beaten by Mrs. Miner for his failure to eat and for throwing food away. *Id.* 176a-179a. At one point, petitioner ran away from home and went to an emergency shelter for the homeless. *Id.* 183a. In 1977, the Wiggins children were dropped from their caseworker's case load as a result of a shortage in Department of Social Services caseworkers. *Id.* 184a.

In November 1978, following stints in two other foster homes and a brief return to the Miners' house, petitioner was placed in the home of Mrs. Martha Blackwell. While there, petitioner – as well as other foster children in the home – was repeatedly raped by Mrs. Blackwell's two sons. A report by petitioner's social worker prepared during this time indicated that petitioner would, even during the winter, go outside at night without his shirt or shoes. Pet. App. 189a-191a.

Petitioner stopped attending school during the eleventh grade. At the age of eighteen, petitioner left the Blackwell home and joined the Job Corps. Pet. App. 191a. While there, petitioner was befriended by a Job Corps Administrator and eventually sexually abused by him. Petitioner reports that when his sexual involvement with the administrator first began, he "thought" or "hoped" that he might be adopted by the administrator. *Id.* 193a. After two years in the Job Corps, petitioner graduated with a degree in food service but was unable to understand what he read. *Id.* 192a-193a.

Petitioner's History After Leaving Foster Care. After leaving the Job Corps and foster care, petitioner worked steadily at a variety of jobs. At some times, however, petitioner was homeless and lived with "different people who befriended him on the streets." Pet. App. 194a-195a.

Results of Tests and Evaluations of Petitioner. Beginning at the age of seven, petitioner was administered various psychological and physical tests, including:

- An October 1968 psychological evaluation, which stated that petitioner "[i]n general seems to be an emotionally flat and expressionless child. When asked, he did not know how old he is." Pet. App. 180a.

- A 1969 report, which stated that petitioner was "extremely lethargic about dressing, eating, and doing most activities"; had "difficulty distinguishing between fantasy and reality"; and had "poor ability to concentrate." *Id.* 179a-180a.

- A 1970 evaluation by a pediatrician, which reported that petitioner had an I.Q. of 72, was "underachieving, hyperactive and observed to have 'staring spells' frequently. * * * He hasn't learned the alphabet yet in the two years he was in school." An electro-encephalograph performed at the pediatrician's referral suggested that petitioner suffered from a "seizure disorder." *Id.* 181a.

- A 1979 evaluation by Lawrence Hines, a community health worker with a master's degree in nursing, which reported that petitioner was "referred because of strange and bizarre behavior," that petitioner's "intellectual capacity was far below that of a 16 year old," and that petitioner was "unable to abstract or conceptualize, but there is no evidence of hallucinations or delusions." Mr. Hines reported that his "impression" of petitioner was "mental retardation with cranial pathology." *Id.* 191a-192a.

In the social history, Mr. Selvog stated that "[f]rom birth to age five, the most critical years of psychosocial development, Kevin Wiggins was severely neglected and

violently abused." Pet. App. 195a. Citing studies regarding the effects of child abuse, including sexual abuse, on its victims, Mr. Selvog concluded that "the horror of [petitioner's] violent childhood environment and the indelible trauma of sexual assault throughout his formative years, combined with borderline mental retardation, impaired his development and significantly contributed to his involvement in the present offense." *Id.* 198a. At trial, Mr. Selvog further testified that "the effects of that sort of abuse and experiences of neglect cause these sort of behavior problems and emotional problems that Kevin exhibited throughout his life," and that petitioner "experienced extreme signs of depression" and "suicide ideation." *Id.* 141a.

Emphasizing the importance of the failure to commission a social history of petitioner, the state post-conviction court ruled from the bench that petitioner's trial counsel had been ineffective:

> I don't even remember a death penalty case that there was not this social history done. * * * Not to do a social history, at least to see what you have got, to me is absolute error. I just – I would be flabbergasted if the Court of Appeals said anything else. I really don't think that is even a close question.

JA 605. In a written decision issued over three years later, however, the court denied post-conviction relief, ruling that although petitioner's counsel was not aware of the mitigating evidence presented during the post-conviction proceeding, the failure to investigate mitigation evidence was a permissible "trial tactic." Pet. App. 155a-156a. On appeal, a divided Maryland Court of Appeals affirmed. *Wiggins* v. *State*, 724 A.2d 1, 17 (1999).

On August 6, 1999, petitioner filed a timely petition for relief pursuant to 28 U.S.C. 2254 in the U.S. District Court for the District of Maryland. Pet. 11. Judge J. Frederick Motz granted petitioner relief with respect to, *inter alia*, his

ineffective assistance of counsel claim. Pet. App. 50a-55a. In reaching his conclusion that petitioner's counsel had been ineffective by failing to develop a mitigation case, Judge Motz specifically emphasized that the information contained in the social history commissioned by petitioner's post-conviction counsel "might well have influenced the jury's appraisal of * * * [petitioner's] moral culpability." *Id.* 55a (quoting *Williams* v. *Taylor*, 529 U.S. 362, 398 (2000)).

On appeal, the Fourth Circuit reversed. Like the Maryland Court of Appeals, it deemed the decision by petitioner's trial counsel not to put on *any* mitigating evidence regarding petitioner's background to be "an informed strategic choice" insofar as counsel was purportedly aware "of some of the details of Wiggins' childhood as they existed in the presentence investigation report and social services records which he had seen." Pet. App. 20a-21a. The court explained that "[a]lthough further investigation would have developed more extensive details of Wiggins' childhood, the extant records did inform [petitioner's counsel] of a possible avenue of mitigation" (*id.* 20a) – an avenue that, according to the court of appeals, petitioner's trial counsel simply chose not to pursue because "it tended to conflict with any attack on" whether petitioner was principally responsible for the murder (*id.* 21a). The court of appeals thus distinguished petitioner's case from this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362, 396 (2000), describing *Williams* as a case in which

> counsel's complete failure to investigate could not have led to a reasonable strategic choice for the simple reason that he had no information upon which to make a strategic choice. It was this wholesale failure that led the Court to conclude that Williams did not receive constitutionally sufficient representation.

Pet. App. 19a.

The court of appeals specifically rejected Judge Motz's conclusion that, contrary to this Court's holding in *Williams*, petitioner's counsel had been ineffective at sentencing insofar as he failed to "conduct a more complete investigation" (Pet. App. 53a) of petitioner's background and, in particular, failed "to develop a social history exposing [petitioner's] harsh childhood and sub-average mental capacity" (*id.* 18a). The court of appeals explained that "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history * * * in a capital case," but instead "merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence." *Id.* 19a.

The court further reasoned that petitioner could not, in any event, have been prejudiced by his trial counsel's failure to commission a social history, because some of the evidence contained in petitioner's social history was – in its view – not "unequivocally mitigating" and thus effectively constituted a "double-edged sword": "the jury could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness." Pet. App. 23a.

SUMMARY OF ARGUMENT

The Fourth Circuit's conclusion that, notwithstanding his failure to investigate and present mitigating evidence at the sentencing phase of petitioner's trial, petitioner's counsel was not constitutionally ineffective is flawed in three respects:

First, the Fourth Circuit's decision fails to acknowledge the significance of the information contained in the available social history evidence to the jury's sentencing deliberations. Based on the expertise of the clinical social workers responsible for compiling social histories and giving testimony regarding those histories and the information contained therein, it is clear that social histories provide important and reliable evidence relevant to jury sentencing

determinations in capital cases. By failing to accord sufficient weight to this information, the Fourth Circuit overlooks the significant effect – as demonstrated by empirical studies – that social histories and the information contained therein can have on jurors in capital cases.

Second, the Fourth Circuit's conclusion that it was reasonable for petitioner's counsel to "retry guilt" because "not all of the available social history evidence is unequivocally mitigating" is unsupported by any empirical evidence, and in any event misapprehends the role of mitigating evidence in a jury's sentencing determination.

Third, the Fourth Circuit's determination that petitioner's trial counsel was not ineffective because he reasonably relied on an "informed strategic choice" to "retry guilt at sentencing" based on his alleged knowledge of a few basic facts regarding petitioner's background fails to attribute sufficient importance to the effect of petitioner's counsel's failure to introduce *any* mitigating evidence at sentencing.

The collective effect of these flaws in the Fourth Circuit's reasoning renders the Fourth Circuit's opinion well outside the mainstream in its treatment of mitigating evidence, but in particular with regard to the kind of mitigating evidence set forth in petitioner's social history.

ARGUMENT

I. Social Histories and Testimony By Clinical Social Workers Contain Important and Reliable Evidence Directly Relevant to Sentencing Determinations In Capital Cases.

Social histories and testimony by clinical social workers contain important and reliable evidence that is routinely and widely used in capital cases to allow the sentencer to make the "individualized assessment of the appropriateness of the death penalty" required by the Constitution. See *infra* at 17-21. The typical master's-level clinical social worker responsible for preparing such social histories and/or

testifying at sentencing has completed graduate courses in cognitive, psychological, and bio-psychosocial development and major theoretical explanations of personality development and human behavior, as well as 900 hours of clinical training in the field before graduating. Indeed, in Maryland, licensed clinical social workers must – in addition to having a master's degree in social work from an accredited program – also pass a licensing examination and have "2 years * * * with supervised experience of at least 3,000 hours after receiving the master's degree with a minimum of 144 hours of periodic face-to-face supervision." Md. Health Occ. Code Ann. § 19-302(e).

In thirty-three states and the District of Columbia, by virtue of their educational background, training, experience, and professional accreditation, clinical social workers with master's degrees are authorized to render diagnoses of psychiatric, psychosocial, and psychological disorders.[2] This overwhelming recognition that clinical social workers are eminently capable of diagnosing and treating such disorders reflects a "consistent body of policy determinations by state legislatures" that clinical social workers are an essential part of the provision of clinical mental health treatment in the United States. *Jaffee* v. *Redmond*, 518 U.S. 1, 13 (1996) (internal citation omitted). Moreover, this broad acceptance of licensed clinical social workers as qualified providers of diagnostic services speaks volumes about the reliability and effectiveness of those services.

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[2] See *In re Adoption/Guardianship No. CCJ14746 in the Circuit Ct. for Wash. County*, 759 A.2d 755, 762 n.9 (Md. 2000) (collecting statutes). Similarly, clinical social workers licensed or certified under state law meet the definition of "clinical social worker" for purposes of federal Medicare reimbursement. Significantly, "clinical social worker services" means services performed by a clinical social worker "for the diagnosis and treatment of mental illness * * * which the clinical social worker is legally authorized to perform under State law." 42 U.S.C. 1395x(hh)(2).

The reliability and effectiveness of the diagnostic services provided by licensed clinical social workers are further demonstrated by both state and federal laws mandating coverage of clinical social work services. Because clinicians cannot undertake treatments without first making diagnoses, and because most insurance forms require diagnoses using the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM-IV")[3] as a condition of rendering payment, these laws – and the reimbursements paid by health insurance plans to clinical social workers for the diagnosis and treatment of emotional and mental illness and substance abuse – reflect a recognition that clinical social workers are fully qualified mental health professionals trained to diagnose DSM-IV-identified mental and emotional disorders. To that end, the clinical social worker's knowledge base (which includes expertise in family theory, clinical understanding of how early trauma affects an individual in later life, training and experience in development, understanding of human behavior as purposeful and goal-oriented, ability to see the client as a human being with complex forms of adaptation, and behavioral development) is both relevant and highly skilled.

Maryland courts have routinely relied on expert testimony presented by social workers. Thus, in *In re Adoption/Guardianship No. CCJ14746 in the Circuit Court for Washington County*, 759 A.2d 755 (Md. 2000), the Maryland Court of Appeals rejected arguments by the biological parent that a social worker should not be allowed to testify regarding his diagnoses of the parent and her child because he was neither a psychiatrist nor a psychologist,

[3] The fourth edition of the American Psychiatric Association's DSM-IV is a standard diagnostic reference tool used by mental health professionals and specifically states that it was designed for use by skilled mental health professionals, including clinical social workers, in clinical practice for the classification and diagnostic assessment of mental disorders. DSM-IV at xv (1994).

holding that the trial court did not err in permitting a licensed clinical social worker to testify as an expert witness and provide diagnostic expert testimony. The Court of Appeals explained that:

> as a licensed clinical social worker, [the expert] is specifically authorized by the [Maryland] Legislature to render diagnoses based on a recognized manual of mental and emotional disorders. It is plain from the statutory language that the Legislature deems licensed clinical social workers capable of rendering diagnoses such as those made by [the expert] based on [the] DSM-IV.

Id. at 759-60.

Based on this expertise, courts have not only relied on expert testimony, including diagnoses, by clinical social workers, but they have also routinely relied on social histories prepared by clinical social workers. For example, in *Moore* v. *Reynolds*, 153 F.3d 1086, 1110 (CA10 1998), the court of appeals relied on two documents submitted to the district court: a psychological report prepared by a psychologist and a social history investigation report prepared by a social worker. The court noted that "[a]lthough many of her conclusions are general, rather than focused specifically on Moore's situation, [the social worker's] report arguably suggests if Moore were to receive proper psychiatric treatment for his mental disorders, he would be less likely to commit future crimes and, in short, would be less dangerous to society." *Id.* Based on the psychological report and the social history, the court of appeals determined that the petitioner had "established a likelihood that his mental condition could have been a mitigating factor at the sentencing phase." *Id.*[4]

[4] See also *Castro* v. *Oklahoma*, 71 F.3d 1502, 1510-14 (CA10 1998) (vacating death sentence when state trial court rejected request for funds for expert psychiatrist to assist at sentencing; in concluding that petitioner

Maryland courts have similarly considered social history reports – including, in at least three other capital cases, social histories prepared by Mr. Selvog[5] – in sentencing proceedings. In *Gilliam* v. *State*, 629 A.2d 685, 700 (Md. 1993), Judge Fader (in whose court petitioner was also sentenced) considered at sentencing a twenty-two-page social history prepared by graduate social work students from the University of Maryland and based on interviews with the defendant and his mother, sister, aunt, and friend. In preparation for post-conviction proceedings, the Office of the Public Defender hired Mr. Selvog to review the first social history and conduct "a second psychosocial investigation of [defendant's] family background," which was then used to provide the basis for conclusions by the psychiatrist retained by post-conviction counsel. *Id.* In considering Gilliam's argument that his state trial counsel erred in relying on the original social history prepared by the graduate social work students, the Court of Appeals quoted at length from the social history compiled by Mr. Selvog:

> Throughout the initial four years of his life, Tyrone Gilliam Jr. witnessed extreme violence between his parents. Both his mother and father were capable of inflicting injury and their fierce and unpredictable outbursts created a home environment that was threatening, confusing and insecure. Further, the ongoing violence between the parents

had "established the likelihood that his mental condition could have been a significant mitigating factor," court cites affidavit from forensic social worker that "describes significant emotional and development impairments which pertain directly to [petitioner's] relative culpability for murder" and notes that, although both petitioner and relative testified at sentencing, "neither could frame the existing mitigating evidence in nearly as coherent a fashion as [the social worker] presumably could have done. * * * Her expertise presumably would have allowed her to relate past instances from [petitioner's] childhood to his crime.").

[5] Mr. Selvog also testified at the post-conviction hearing that he had been qualified as an expert in six capital cases in Maryland. JA 414-15.

> elicited the constant fear from Tyrone Jr. and his sister that at any moment they too might suffer the same brutalization.
>
> After his parents' final separation, which followed a particularly explosive episode, Tyrone Jr.'s existence became even more unstable as he moved with his mother and sister to many different residences during the next four years. And the trauma he had suffered when his parents were together did not end after their separation; he continued to be subjected to a fearful and brutal environment while cared for at his maternal grandmother's home. Here his stepgrandfather viciously abused his wife, children and grandchildren. And on top of this were the constant sexual attacks Tyrone Jr. was subject to in this house and as well as at the hands of a babysitter.

Id. at 700.[6] Similarly, in *Ball* v. *State*, 699 A.2d 1170 (Md. 1997), the sentencing judge heard testimony from the defendant's wife, mother, and Mr. Selvog that was

> aimed, in part, at establishing that Appellant was emotionally disturbed from a young age and that he had no prior convictions for crimes of violence. Toward this end, Mr. Selvog prepared a social history of Appellant, which included information concerning Appellant's previous convictions for

[6] In *Gilliam*, by the agreement of the prosecution and Mr. Gilliam's counsel, Mr. Selvog's social history report was admitted into evidence "with the exception of the portion containing his opinions." 629 A.2d at 691. Because it concluded that Gilliam had not preserved the issue for appellate review, the Court of Appeals declined to decide whether the portion of the social history containing Mr. Selvog's opinions were properly excluded. *Id.* In petitioner's case, the Maryland Court of Appeals did not question either the admissibility or the reliability of the social history prepared by Mr. Selvog.

> drug-related and motor vehicle offenses, as well as various burglary and theft offenses.

Id. at 1177. See also *Whittlesey* v. *State*, 665 A.2d 223 (Md. 1995) (discussed *infra* at 16-17).

Reliance on social history is consistent with this Court's sensitivity "to any impediment to the consideration of any type of mitigating evidence in a death sentencing hearing." *Hutchins* v. *Garrison*, 724 F.2d 1425, 1437 (CA4 1983). Thus, "[r]ecognizing that 'the imposition of death by public authority is * * * profoundly different from all other penalties,'" this Court has repeatedly held that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] * * * not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Eddings* v. *Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604-05 (1978) (plurality opinion)). Following cases such as *Eddings*, *Lockett*, and *Green* v. *Georgia*, 442 U.S. 95 (1979) (per curiam), in which this Court found that the exclusion of testimony as hearsay at the guilt phase of a capital trial violated the Due Process Clause, the courts of appeals have emphasized that mitigation evidence proffered by a capital defendant should generally be admitted when it is "reliable and relevant." *Sallahdin* v. *Gibson*, 275 F.3d 1211, 1237 (CA10 2002).

The Maryland Court of Appeals has reached similar conclusions regarding the importance of ensuring that all mitigation evidence gets to the jury in capital proceedings. In *Whittlesey* v. *State*, 665 A.2d 223 (1995), a decision issued two years prior to the post-conviction trial court's opinion, the Maryland Court of Appeals vacated appellant's death sentence and remanded for a new sentencing proceeding when the trial court had excluded as hearsay several documents and the testimony of four witnesses – including that of Hans Selvog, who had "prepared a comprehensive

social history of the Whittlesey family in an effort to apprise the jury of Appellant's difficult family background." *Id.* at 241. The court of appeals interpreted Md. Ann. Code art. 27, § 413(c)(1), which governs the admission of evidence at Maryland capital sentencing proceedings, as requiring "that evidence be reliable, but not that it comply with the strict standards applicable in the guilt-or-innocence phase of the trial." *Id.* at 243. Thus, the court explained, on remand in any capital sentencing proceeding, the trial court

> shall admit any relevant and reliable mitigating evidence, *including hearsay evidence that might not be admissible in the guilt-or-innocence phase of the trial*. This relaxed standard for admissibility of evidence will ensure that the fact finder has the opportunity to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Id. at 244 (quoting *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis added)).

II. The Fourth Circuit Erred In Failing To Attribute Significance To The Failure To Introduce Social History Evidence.

This Court has long held that capital punishment serves two purposes: deterrent and retributive. See, *e.g.*, *Enmund* v. *Florida*, 458 U.S. 782, 786 (1982). "The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison* v. *Arizona*, 481 U.S. 137, 149 (1987). The principle that the sentencer's sense of a defendant's moral culpability is an essential element in determining whether to impose the death penalty has been consistently reflected in this Court's precedents. In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), this Court explained that

> punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse."

Id. at 319 (quoting *California* v. *Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Such an individualized assessment is necessary, this Court has emphasized, because "only when the jury is given a vehicle for expressing its reasoned moral response * * * in rendering its sentencing decision * * * can we be sure that the jury * * * has made a reliable determination that death is the appropriate sentence." *Penry* v. *Johnson*, 532 U.S. 782, 797 (2001) (internal quotations and citations omitted). See also *Woodson* v. *North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (because death sentence is qualitatively different from other sanctions, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case") (citation omitted)).

The Fourth Circuit's decision failed to appreciate the significance of the substantial mitigating evidence that would have been available for presentation at sentencing – *viz.*, the "crucial facts" (Pet. App. 54a) of petitioner's social history. This Court recognized the importance of the information contained in a capital defendant's social history in *Williams* v. *Taylor*, 529 U.S. 362 (2000), in which this Court reversed the Fourth Circuit's determination that the petitioner in that case had not been prejudiced by the ineffective assistance of his counsel. *Id.* at 398. In so holding, this Court accorded significant weight to the failure of Williams's counsel to investigate or present "extensive" evidence regarding

Williams's "nightmarish" childhood (*id.* at 395), explaining that "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability" (*id.* at 398).

Like this Court in *Williams*, the courts of appeals have repeatedly emphasized the importance of the details of a capital defendant's social history and, in particular, the likelihood that such details may provide sufficient information about a defendant so as to affect the jurors' assessment of his moral culpability and, ultimately, result in the imposition of a life sentence. Indeed, information regarding a capital defendant's social history is regarded as so central to the sentencing proceeding that at least one court has emphasized that "a substantial mitigating case may be *impossible* to construct without a life-history investigation." *Karis* v. *Calderon*, 283 F.3d 1117, 1135 (CA9 2002) (emphasis added). The information in a defendant's social history allows jurors to "know where the defendant came from and how he came to sit before them convicted of a capital crime. Jurors intuitively understand that some people are dealt a poor hand in life, through their genetic and social inheritance and their family environment." *Id.* at 1133 n.9 (quoting criminal law expert who appeared at federal habeas hearing); see also *id.* at 1140 (information contained in petitioner's social history, including information regarding abuse suffered as child, would have been "important in understanding the root of [petitioner's] criminal behavior and his culpability"). See also *Smith* v. *Stewart*, 241 F.3d 1191, 1198-1200 (CA9 2001) (remanding for resentencing when petitioner's trial counsel had failed to investigate or present evidence of the petitioner's mental impairment and social history, including a "horrific childhood," that the court of appeals regarded as "powerful and potentially lifesaving").

Thus, in *Coleman* v. *Mitchell*, 268 F.3d 417, 447 (CA6 2001), *cert. denied*, 122 S. Ct. 1639 (2002), the Sixth Circuit

found that petitioner's counsel had been constitutionally ineffective when he had failed to investigate petitioner's personal history and his presentation at sentencing consisted only of an unsworn statement by petitioner and a closing argument that did not mention petitioner's personal history. The court of appeals explained that "given Petitioner's personal background, psychological history, and potential organic brain dysfunction, * * * it is reasonably probable that the presentation of even a substantial subset of the mitigating evidence detailed above would have humanized [petitioner] before the jury such that at least one juror could have found he did not deserve the death penalty." 268 F.3d at 454 (internal quotations omitted). See also *Glenn* v. *Tate*, 71 F.3d 1204, 1207 (CA6 1995), *cert. denied*, 519 U.S. 910 (1996) (trial counsel ineffective when jury "was given virtually no information on [petitioner's] history, character, background and organic brain damage – at least no information of a sort calculated to raise reasonable doubt as to whether this young man ought to be put to death"); *Lambright* v. *Stewart*, 241 F.3d 1201, 1208 (CA9 2001) (recognizing that "[e]vidence of mental disabilities or a tragic childhood can affect a sentencing determination even in the most savage case"); *infra* at 25 (discussing *Emerson* v. *Gramley*, 91 F.3d 898, 906 (CA7 1996)).

As the district court recognized in granting petitioner habeas relief with respect to his sentence, and as the experiences of *amici* reflect, the social history subsequently prepared by petitioner's post-conviction counsel contained compelling information regarding petitioner's background that, if presented as mitigating evidence at petitioner's sentencing, "might well have influenced the jury's appraisal of * * * [Wiggins's] moral culpability." Pet. App. 55a (quoting *Williams* (alterations in original)). In contrast to the district court's opinion, as well as the opinions of this Court and other courts of appeals, the Fourth Circuit's decision that petitioner's trial counsel was not constitutionally ineffective failed to appreciate the weight that the information contained

in petitioner's social history could have carried in the jury's sentencing deliberations.

Significantly, the positive effect that social histories and the information contained therein can have on jurors in capital cases is not merely speculative, but has been borne out in numerous empirical studies. In a 1997 poll, only forty-seven percent of the participants surveyed indicated that they favored the imposition of the death penalty on defendants who were the victims of serious abuse as children, while a 1995 study indicated that only nine percent of the participants favored the death penalty for mentally retarded defendants. See John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1503 (1999).

A survey of South Carolina residents who had actually served as jurors in capital cases revealed similar – and sometimes even more dramatic – results: forty-three percent of the jurors interviewed indicated that they were more likely to vote for a life sentence if presented with evidence that the defendant had been seriously abused as a child, while nearly seventy-four percent of the jurors surveyed indicated that evidence of the defendant's mental retardation would make them less likely to vote for death sentence. See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1575-76 tbl. 10 (1998). Fifteen percent of the jurors surveyed also attached some mitigating weight to evidence that the defendant had been extremely poor as a child. *Id.* Particularly given that a death sentence may only be imposed by a unanimous vote of jurors, the presentation of evidence regarding a defendant's social history may – as other courts of appeals have recognized – well have a direct effect on the outcome of a capital defendant's sentencing.

For two reasons, this empirical evidence regarding the likely effect that mitigating evidence would have had on the

jury's decision to sentence petitioner to death is in no way undermined by evidence indicating that "lingering doubt" theories – *e.g.*, the "strategy" purportedly adopted by petitioner's trial counsel – can also be effective in persuading jurors to impose a life sentence. Garvey, *supra*, at 1563.

First, efforts to raise doubts regarding guilt at the sentencing phase cannot be regarded as a legitimate tactic in petitioner's case, in which the jury did not decide petitioner's guilt and thus could not have harbored any "lingering doubts" remaining from the guilt phase. To the contrary, trial counsel's "strategy" would have effectively required the jury to overturn the judge's decision – an unlikely scenario in any event, but especially so in light of the repeated admonitions to the sentencing jury emphasizing that petitioner's guilt had already been determined.[7] Further, petitioner's trial counsel's "strategy" of "retrying" petitioner's guilt utterly failed to account for the relevant inquiry at sentencing: whether petitioner had *actually committed* the murder at issue. Petitioner's trial counsel did not pursue this inquiry – by, for example, positing who else might have committed the murder – and instead made only the vastly different argument that the jury should reach the "stunning conclusion" that it could not "be sure beyond a reasonable doubt" that petitioner "*had any role at all*" in the victim's death. JA 391 (emphasis added).

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[7] See JA 53 (prospective jurors instructed that petitioner "has been found guilty of the murder of Florence Lacs in the first degree and the robbery of Florence Lacs"); *id.* 362 (jury instructed that petitioner's conviction "is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact."); *id.* 404, 407 (prosecutor emphasized that petitioner "has been convicted of first degree murder and robbery," and that jury was to "consider his crime" and "weigh that against what you know about his background"); *id.* 391 (petitioner's trial counsel conceded during closing arguments that petitioner "has been convicted" and that jury "cannot change that").

Second, even if efforts to create lingering doubt regarding petitioner's responsibility for the murder were a legitimate strategy in petitioner's case, such a strategy would not – as Judge Niemeyer noted in his concurring opinion (Pet. App. 25a-26a) – preclude petitioner's trial counsel from also presenting the substantial available mitigating evidence regarding the abuse suffered by petitioner as a child and his borderline mental retardation. Indeed, as Judge Motz (*id.* 55a n.17) emphasized in granting petitioner habeas relief with respect to his death sentence:

> [M]itigating information [regarding petitioner's] vulnerability and limited intelligence would not have been strategically inconsistent with "retrying guilt" during the sentencing phase. * * * [S]killful counsel would have been able to mesh these facts into an effective argument that Wiggins had been made the pawn of others who were responsible for the murder.

III. The Fourth Circuit Erred In Holding That Petitioner Received Constitutionally Effective Counsel On The Ground That The Available Mitigating Evidence Was Potentially A "Double-Edged Sword."

According to the Fourth Circuit, "counsel is not ineffective for failing to introduce evidence that would have hurt as much as it helped." Pet. App. 22a (citing *Darden* v. *Wainwright*, 477 U.S. 168, 186-87 (1986)). In petitioner's case, the court of appeals opined, "not all of the available social history evidence is unequivocally mitigating," but was instead effectively a "double-edged sword" – that is, "the jury could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness." *Id.* The Fourth Circuit's holding that petitioner's trial counsel was not constitutionally ineffective because the evidence that would have resulted from an investigation of petitioner's background was not "unequivocally mitigating" misapprehends the role that mitigating evidence plays in a capital sentencing proceeding.

To begin, the Fourth Circuit's blanket statement that the sentencing jury "could just as easily have viewed [petitioner's] childhood and limited mental capacity as an indicator of future lawlessness" is not merely unsupported by any actual data, but it is in fact directly contradictory to the empirical evidence (see *supra* at 21) regarding the effect that social histories can have on a jury's sentencing decision, and in particular on a jury's assessment of a capital defendant's moral culpability. See Blume & Johnson, *supra*, at 1502-03.

Moreover, the Fourth Circuit's treatment of such allegedly "double-edged" evidence is out of step with the treatment of mitigating evidence by this Court and other courts of appeals. In *Williams*, this Court held that the petitioner's counsel had been constitutionally ineffective when he had failed to investigate or present mitigating evidence regarding, *inter alia*, the abuse and neglect suffered by petitioner as a child and proof of borderline mental retardation. 529 U.S. at 396. The Court reached this conclusion notwithstanding that the available mitigating evidence would also have revealed Williams's extensive criminal record, including convictions for armed robbery, burglary, grand larceny, auto theft, and two violent assaults on elderly victims. *Id.* Such evidence, this Court specifically concluded, did not justify "the failure to introduce the comparatively voluminous amount of evidence that did speak in [Williams's] favor" (*id.* at 396), while "the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's *appraisal of his moral culpability*" (*id.* at 398 (emphasis added)). Moreover, the Court noted, the evidence of Williams's previous violent actions actually served a mitigating purpose by demonstrating that "in each case" his previous criminal offenses, like the murder for which he had been sentenced to death, "his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation. Mitigating evidence unrelated to dangerousness may alter the jury's

selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.*

Like this Court in *Williams*, and unlike the Fourth Circuit in this case, other courts of appeals have recognized that counsel may be constitutionally ineffective for failing to investigate and present available mitigating evidence even when that evidence also contains allegedly "harmful" aspects. In *Emerson* v. *Gramley*, 91 F.3d 898 (CA7 1996) (Posner, J.), petitioner's trial counsel had failed to investigate – and therefore to introduce at sentencing – mitigating evidence. The court of appeals concluded that petitioner's trial counsel had been constitutionally ineffective because the social history evidence subsequently collected for petitioner's post-conviction proceedings might have affected at least one juror's assessment of petitioner's moral culpability:

> the possibility that a case in mitigation along the lines devised by these lawyers might have saved Emerson from the death penalty cannot confidently be reckoned trivial. The mitigation specialist's 30-page single-spaced report is a moving narrative of a life that one juror in twelve might find so bleak, so deprived, so harrowing, so full of horrors (including the death of Emerson's child, possibly strangled by her mother, and the death of one of Emerson's brothers by shooting), as to reduce Emerson's moral responsibility for the murder of Byrd to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think Emerson deserving of mercy.

Id. at 907. Significantly, the court of appeals in *Emerson* reached this conclusion even though the favorable mitigating evidence available to petitioner's trial counsel was "outweighed or at least offset" by "additional evidence of criminal and other antisocial behavior." *Id.*

Similarly, in *Lockett* v. *Anderson*, 230 F.3d 695, 710-11 (CA5 2000), the Fifth Circuit reversed the district court's

decision that Lockett's counsel had not been constitutionally ineffective when the available mitigating evidence regarding his "mental and emotional problems" was potentially "more harmful than helpful." While acknowledging the "tension * * * between a possible jury finding of reduced culpability versus the possible conclusion that Lockett's mental problems aggravated the threat of future dangerousness" (*id.*), that court – following this Court's decision in *Williams* – nonetheless held that the available mitigating evidence may well have affected the jury's assessment of Lockett's moral culpability:

> If we can conclude that a juror could have reasonably concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established. If the medical opinion testimony in this case – that Lockett suffered from some organic brain disorder that tended to explain his violent conduct and made him less able to control his behavior than a normal person – had been presented to the jury, we think a reasonable juror could have found that his particular mental condition * * * made him less morally culpable for his cruel and senseless crime.

Id. at 716. The Fifth Circuit concluded that the failure of Lockett's counsel even to "investigate this mitigating evidence, combined with the general lack of any mitigating evidence before the jury, denied Lockett any opportunity, vouchsafed by the law, to avoid the death penalty." *Id.*

The Eleventh Circuit reached the same conclusion in *Harris* v. *Dugger*, 874 F.2d 756 (CA11), *cert. denied*, 493 U.S. 1011 (1989). Acknowledging that the available mitigation evidence was "fraught with danger" because it "would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army," the court held that Harris's counsel had been constitutionally ineffective because "[t]estimony about [his] good character constituted the only

means of showing that Harris was perhaps less reprehensible than the facts of the murder indicated." *Id.* at 764. See also *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (CA8 1983) (district court's ruling that mitigating evidence "would do more harm than good" was "sheer speculation").

This Court's holding in *Williams* and the reasoning of other courts of appeals demonstrate beyond cavil that petitioner's counsel was constitutionally ineffective insofar as he failed to investigate or present substantial mitigating evidence regarding petitioner's background, and the possibility that such evidence could serve as a so-called "double-edged sword" does not save petitioner's counsel from ineffectiveness. Rather, the relevant inquiry is whether such evidence might have affected the jury's assessment of petitioner's moral culpability. Particularly in light of the relative weakness of the state's case supporting the death penalty (Pet. App. 51a), the Fourth Circuit's failure to undertake such an inquiry misapprehends the role of mitigating evidence in a capital sentencing proceeding.

IV. The Fourth Circuit Erred In Failing To Attribute Significance To The Fact That Petitioner's Counsel Introduced No Mitigating Evidence, Especially When Maryland Courts Follow the "One Juror" Rule.

At sentencing, petitioner's trial counsel did not introduce any mitigating evidence regarding petitioner's background "other than the stipulated statutory mitigating factor that Wiggins had no prior violent convictions" (Pet. App. 8a), and instead opted to "retry" the issue of petitioner's guilt. Deeming the decision not to further investigate or present mitigating evidence regarding petitioner's background to be an "informed strategic choice" by counsel, the court of appeals concluded that petitioner's trial counsel had not been constitutionally ineffective. *Id.*

The Fourth Circuit's holding that petitioner's trial counsel was not constitutionally ineffective fails to attribute

sufficient importance to counsel's failure to introduce any mitigating evidence whatsoever regarding petitioner's background. Because the trial judge had already rendered a guilty verdict in petitioner's case, such that the jury was charged only with sentencing petitioner, any "decision" by petitioner's trial counsel not to investigate or present *any* mitigating evidence cannot be regarded as a legitimate trial strategy: as Justice O'Connor noted in *Williams* v. *Taylor*, 529 U.S. 362, 415 (2000), counsel's failure to investigate and present substantial mitigating evidence "provided the jury with no reasons to spare petitioner's life."

Both before and since *Williams*, other courts of appeals reviewing ineffective assistance of counsel claims have properly attributed considerable significance to the total failure of counsel to introduce any mitigating evidence. These courts have emphasized that the presentation of mitigating evidence is an essential part of the individualized assessment of the defendant's moral culpability required in any sentencing proceeding. Thus, in *Battenfield* v. *Gibson*, 236 F.3d 1215, 1235 (2001), the Tenth Circuit agreed with petitioner that his trial counsel – who also had failed to investigate or introduce mitigating evidence – had been constitutionally ineffective. The court explained that

> the jury sentenced [petitioner] knowing only that he was involved in the [victim's] murder * * * and previously had been convicted of assault and battery with a dangerous weapon. Had they been given more information about [petitioner's] background, personality, and the facts of his prior conviction, we conclude there is a reasonable probability they would have determined the mitigating circumstances outweighed the single aggravating circumstance.

Similarly, in *Pickens* v. *Lockhart*, 714 F.2d 1455, 1467 (1983), the Eighth Circuit held that petitioner's counsel had been constitutionally ineffective when he had failed to present any mitigating evidence. The court of appeals explained that

the failure to present mitigating evidence "deprived Pickens of the possibility of bringing out even a single mitigating factor" that the jury "would have considered * * * and possibly been influenced by." *Id.*[8]

In petitioner's case, the failure of his trial counsel to present any mitigating evidence regarding petitioner's background takes on special significance in light of the prosecution's argument to the jury that its duty was to "consider his crime" and "weigh that * * * against what you know about his background." JA 404, 407. Because petitioner's counsel had not presented any mitigating evidence about petitioner's background, the jury that sentenced petitioner knew only that he had not previously been convicted of any crimes; like the jury in *Williams*, they were "provided with no [other] reasons to spare petitioner's life." 529 U.S. at 415 (O'Connor, J., concurring). By holding that petitioner's trial counsel was not constitutionally ineffective because he had made an "informed strategic decision" to retry petitioner's guilt, the Fourth Circuit's decision overlooks the significance of the failure of petitioner's trial counsel to introduce any mitigating evidence regarding petitioner's background, as well as the impact of that complete dearth of mitigating evidence on the jury's ability to make the "individualized assessment" of petitioner's moral culpability guaranteed by the Constitution.

Further, the experiences of *amici* indicate that the failure of petitioner's trial counsel to present mitigating evidence regarding petitioner's background and borderline intelligence is particularly serious because, under Maryland law, the death penalty cannot be imposed if even one juror believes that the

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[8] See also *Smith* v. *Stewart*, 140 F.3d 1263, 1268 (CA9) (emphasizing that in light of aggravating factors, "counsel's failure [to put on mitigating evidence] was a virtual admission that the death penalty should be imposed upon his client"), *cert. denied*, 525 U.S. 929 (1998); *supra* at 25-26 (discussing *Emerson* and *Lockett*).

mitigating evidence outweighs any aggravating evidence. See *Borchardt* v. *Maryland*, 786 A.2d 631, 660 (Md. 2001). Other courts of appeals have attributed substantial weight to this rule, reasoning that because the proper inquiry under *Strickland* is whether there is a "reasonable probability that the outcome would have been different" absent counsel's failures (446 U.S. 668, 694 (1984)), it is crucial to account for the particular circumstances in which a life sentence would have been imposed at trial. Both the Seventh and Eighth Circuits have employed precisely this approach in *Emerson* and *Lockett* (*supra* at 25-26). Similarly, in *Mak* v. *Blodgett*, 970 F.2d 614 (1992), *cert. denied*, 507 U.S. 951 (1993), the Ninth Circuit expressly rejected the argument that the district court had erred in finding prejudice by considering the effect of mitigating evidence on a single juror. The court of appeals explained that "the effect-on-one-juror approach comports with Washington death penalty law. The law of Washington * * * allows any one juror to set aside the death penalty." *Id.* at 621. The Third, Fifth, Sixth, Tenth, and Eleventh Circuits have reached the same conclusion.[9]

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition for certiorari and the petitioner's brief on the merits, the judgment of the Fourth Circuit should be reversed.

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[9] See also *Coleman* v. *Mitchell*, 268 F.3d 417, 452 (CA6 2001), *cert. denied*, 122 S. Ct. 1639 (2002) (discussed *supra* at 19-20); *Neal* v. *Puckett*, 239 F.3d 683, 691 (CA5 2001); *Castro* v. *Oklahoma*, 71 F.3d 1502, 1516 (CA10 1998) ("Our harmless error inquiry * * * may be framed in its starkest terms by inquiring, 'Do [we] harbor a significant doubt that this evidence would have caused at least one juror to choose life rather than death?" (internal citation omitted; alteration in original); *Frey* v. *Fulcomer*, 974 F.2d 348, 368 (CA3 1992), *cert. denied*, 507 U.S. 954 (1993); *Bertolotti* v. *Dugger*, 883 F.2d 1503, 1519 n.12 (CA11 1989) ("[I]f there is a reasonable probability that one juror would change his or her vote, there is a reasonable probability that a jury would change its recommendation."), *cert. denied*, 497 U.S. 1032 (1990).

Respectfully submitted,

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Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF JANET F. RENO, *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

This brief is filed on behalf of present and former federal, state, and local prosecutors who share the view that effective representation at the sentencing phase of a death penalty proceeding is necessary to promote a fair and efficient criminal justice system and to maintain public confidence in the enforcement of the death penalty. Although the signatories to this brief have different views regarding the death penalty – some support it, while others oppose it – all agree that if our criminal justice system has a death penalty, it must be administered pursuant to a process that is fair, and in a manner that will instill public confidence in the criminal justice system.[1]

SUMMARY OF ARGUMENT

Amici submit this brief to address the particular interests of prosecutors that we believe justify a strong statement by this Court requiring adequate investigation into mitigating evidence by defense counsel in a capital case. *First*, *amici* are concerned that the Fourth Circuit's decision suggests that defense counsel in a death penalty case does not have an obligation to conduct an investigation of mitigating evidence. 288 F.3d at 640-41. As prosecutors, we believe that such a reading misstates this Court's precedents, is bad policy, and is contrary to important prosecutorial interests. Ineffective

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1. A list of the *amici* who are filing this brief is set forth in the Appendix. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amici curiae* or counsel, has made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of *amicus* briefs, and copies of their consents have been filed with the Clerk of the Court.

representation by defense counsel can lead to conviction of innocent persons, and renders convictions and death sentences needlessly vulnerable on direct appeal and collateral review. Concerns about the fairness and accuracy of the administration of the death penalty have even led two states to impose a moratorium on carrying out death sentences after the entire appellate and post-conviction process has been completed. Through all of this – direct appeals, collateral proceedings, retrials, and system-wide moratoriums – crime victims and their families are denied the closure that the verdict should render, and the public is denied the finality of outcome that an effective criminal justice system should ensure.

Moreover, the vigor of our adversary system underlies public and jury support for our criminal justice system. It is of the utmost importance in maintaining that public support that counsel appointed in capital cases provide vigorous and effective representation in all phases of the proceeding. Effective representation in and presentation of a capital case requires extensive preparation for both the guilt and the sentencing phases, and can only be accomplished after defense counsel has conducted a thorough investigation into whether death is an appropriate sanction under the law in light of the defendant's background. Condoning imposition of a death sentence where the defendant has not had the benefit of such an investigation will, in the long run, undermine public confidence in the criminal justice system as a whole.

Second, providing effective representation at the outset of a case will significantly reduce the amount of resources that must be expended in capital cases. Ineffective assistance of counsel claims typically require the government to defend

counsel's performance against second-guessing on appeal or post-conviction proceedings, and may ultimately result in a retrial. Indeed, the cost of post-conviction litigation of *Strickland* claims – which are complicated and often require evidentiary hearings on multiple procedural and constitutional questions – can exceed the cost of the original trial. Similarly, effective assistance of counsel generally, and a proper mitigation investigation by defense counsel in particular, can assist prosecutors in better managing already scarce public resources. As the Judicial Conference of the United States concluded in its study on the federal death penalty, "[s]ince an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds." JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.1 (1998). These costs – as well as the potential unfairness to crime victims and their families – can be avoided or substantially reduced if effective representation is provided at trial.

ARGUMENT

I. EFFECTIVE REPRESENTATION BY DEFENSE COUNSEL AT TRIAL HELPS ENSURE THAT THE DEATH PENALTY IS FAIRLY ADMINISTERED

A. Effective Defense Counsel Ensures the Fairness and Accuracy of Pre-Trial and Trial Proceedings

Prosecutors face few dilemmas more troubling than defense counsel who are of marginal competence, or worse. Ineffective defense counsel increases the possibility that an innocent defendant will be convicted – a prospect that is troubling in any criminal case, but particularly when the possible outcome is execution.[2] Moreover, inadequate representation by defense counsel at trial undermines the likelihood that any conviction obtained will be sustained on appeal or in post-conviction proceedings. Inexperienced or ineffective counsel are more likely to commit errors themselves and less likely to object to prosecutorial error. This can lead to mistrials, reversals on appeal or post-conviction relief; even taking into account the plain error standard and the deference accorded state court judgments under the habeas corpus statute, 28 U.S.C. § 2254, these errors can multiply the number, complexity, and cost of post-conviction proceedings.

In short, prosecuting a case against incompetent defense counsel injects a degree of uncertainty and risk into the trial

2. In the instant case, while voting to reverse the grant of a writ of habeas corpus, Chief Judge Wilkinson felt moved to express some doubt about petitioner's guilt. *Wiggins v. Corcoran*, 288 F.3d 629, 643 (4th Cir. 2002). The existence of such doubt on the part of a respected federal appellate judge surely does not add to public confidence in the criminal justice system.

process which increases the burden upon any prosecutor who wants a conviction to stand up to the scrutiny of the appellate and post-conviction system. Incompetent counsel can lead to wrongful convictions, and can imperil convictions even in the most solid cases where there is virtually no question of guilt. Ineffective assistance thus endangers innocent defendants, defeats the important goal of finality in the criminal process, *see, e.g., Kuhlmann v. Wilson*, 477 U.S. 436, 453 & n.16 (1986), and deprives crime victims and their families of the closure to which they are entitled.

These concerns have led prosecutors to recognize the importance of providing an adequate defense to criminal defendants. Indeed, most prosecutors do not fear capable defense counsel in a capital case, but welcome them, as many have said publicly:

- **Paul Logli** (State's Attorney, Winnebago County, Illinois): "No one, especially prosecutors, wants incompetent defense lawyers on the other side of the counsel table, especially in a murder case. . . . Any prosecutor who has had to retry a case more than once, especially a capital case, is most supportive of good and competent counsel for the defense. It benefits no one, especially victims, to have to retry a major case."[3]

- **Stuart Van Meveren** (District Attorney for the Eighth Judicial District, Fort Collins, Colorado): "I want to make you aware of a little

3. *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002).

known fact—most experienced prosecutors want a competent defense counsel. . . . To my mind there is nothing worse than retrying a case on the merits—memories have faded, evidence may be lost, and the victim must reawake scars that have hopefully been healed to some degree. . . . [With incompetent counsel avoiding retrial is] more difficult because you need to make sure the defense counsel doesn't accidentally create error that will lead to reversal."[4]

- **Ronald Eisenberg** (Deputy District Attorney, Philadelphia, Pennsylvania): "I believe there is no real disagreement on this goal; I know of no prosecutor who does not desire an active, ethical capital defense bar pursuing clients' interests. Such quality representation is necessary to achieve justice, public confidence, and efficiency."[5]

- **Beth Wilkinson** (former federal prosecutor in the Oklahoma City bombing case): "As a prosecutor, I wanted both Timothy McVeigh and Terry Nichols to be represented by a good defense lawyer for many reasons. First and foremost, a competent defense counsel is

4. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 160-61 (2000).

5. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 48 (2001).

essential in getting at the truth. I wanted the defense to do a thorough investigation to make it easy for the appellate court to decide there had been a fair trial. . . . I also wanted the families of the victims to rest knowing the perpetrators were punished. When a defendant has ineffective counsel the state, the families of victims, and society all suffer. Litigation becomes protracted, complicated and costly, putting legitimate convictions at risk."[6]

- **Roscoe Howard** (now U.S. Attorney for the District of Columbia): "Trials conducted improperly because of poor and inadequate representation by defense counsel end up becoming retrials or a rehearing. . . . [The state] ends up paying for the time of the court, its personnel, the prosecutor, and a different, if not competent, defense counsel for the second trial. . . . The prosecutor's goal is to do the trial once and do it right. . . . This should be the goal of the criminal justice system in general and the death penalty courts in particular. Ineffective defense counsel defeats this goal."[7]

- **W.A. Drew Edmonson** (Attorney General, State of Oklahoma): "No Attorney General I know, not a single prosecutor I have ever

6. *Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 54 (2001).

7. Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 890-91 (1996).

> known, and certainly no judge or jury, wants to be responsible for the incarceration, much less the execution of an innocent person. . . . In my county, we had judges that happened to look for the best lawyers to handle capital cases, and as a result of that no death penalty case during my term as district attorney or preceding it out of Muskogee County has been reversed. . . . What we worried about was the [defendant] who came in and hired the guy who did his worker's comp case to defend him in a capital case."[8]

Surveys of law enforcement personnel similarly have found widespread support for providing effective defense counsel to criminal defendants.[9]

B. Effective Representation By Defense Counsel Underpins Public Confidence in the Criminal Justice System

This Court, in its pronouncements on the Sixth Amendment right to counsel, has continuously emphasized

8. *Post-Conviction DNA Testing: When is Justice Served: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 18, 83-84 (2000).

9. For example, a 1988 survey of law enforcement officials performed by a blue-ribbon commission of the American Bar Association concluded: "Prosecutors and police appreciate the role of the defense lawyer and do not believe that these lawyers impair their ability to control crime or to prosecute crime effectively. . . . [T]he problem is not that the defense representation is too aggressive but that it is too often inadequate. . . ." AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, CRIMINAL JUSTICE IN CRISIS Intro. § k.8 (1988).

that an effective and vigorous adversary system is essential to the proper functioning of our criminal justice system. "From the very beginning, our state and national constitutions have laid great emphasis on procedural and substantive safeguards designed to assure fair trials. . . . This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Indeed, this Court has emphasized that "[t]he right to counsel *is* the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (emphasis added).

Awareness of this right has permeated public awareness; the "courtroom drama" is a staple of television and motion pictures, and the *Miranda* warnings' invocation of the right to counsel has become "part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). Indeed, numerous commentators have noted that the *Gideon* decision is at the center of the public's belief that the criminal justice system is administered in a fair manner, and does not lead to erroneous convictions. *See, e.g.*, Yale Kamisar, *The Gideon Case 25 Years Later*, N.Y TIMES, Mar. 10, 1988, at A27 (*Gideon* is "one of the most popular decisions ever handed down by the Supreme Court"); William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV. 483, 606 (2002) ("the Court's early decisions on criminal procedure, particularly its decision on right to counsel in *Gideon v. Wainwright*, were broadly hailed for their fundamental fairness, an attitude that in part reflected changing public attitudes toward poverty") (footnote omitted).

As Attorney General John Ashcroft has stated, "Public confidence is an essential component to the administration

of justice."[10] Many prosecutors have recognized that effective defense representation is essential to ensuring continued public support for the system:

- **Hon. Gerald Kogan** (former Chief Justice of the Supreme Court of Florida and former Head of the Capital Crimes Prosecution Unit in Dade County, Florida): "Far too often, the adversary system does not work. Instead it breaks down because the defense attorney is not experienced, not competent, or in some cases, not even awake or sober. In these cases, the verdicts are not reliable and work only to undermine and destroy public confidence in the judicial system."[11]

- **Hon. William S. Sessions** (former Director, Federal Bureau of Investigation): "Given the high stakes – literally life and death – we need to be as certain as possible about the guilt of the accused person before sentencing that person to die. In today's environment we have . . . capabilities that will better assure that certainty . . . [including] better safeguards in the system to ensure that those arrested have competent defense counsel."[12]

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10. *United States Department of Justice: Oversight Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 31 (2001).

11. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 181 (2000).

12. *Post-Conviction DNA Testing: When is Justice Served?: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 219 (2000).

- **Eliot Spitzer** (Attorney General, New York State): "Ultimately, the integrity of our criminal justice system rests on the assurance that capital defendants have competent counsel. . . . Competent counsel, after all, is a key element in ensuring that the innocent go free, that the guilty are caught, and that the criminal justice system adheres to the highest standards of constitutional practice."[13]

- **Hon. William Delahunt** (former District Attorney, Norfolk County, Massachusetts; Member of Congress): "The two most effective steps we can take to ensure greater fairness and accuracy in the administration of justice [are] access to post-conviction DNA testing, and the right to competent counsel in death penalty cases. . . . We must take steps to prevent wrongful convictions in the first place. And the single most important step is to ensure that every indigent defendant in a capital case has a competent attorney."[14]

As prosecutors, we recognize that the fairness of the administration of criminal justice is of the utmost importance in maintaining public and jury support for the entire criminal justice system. As noted above, we have different views on the appropriateness of the death penalty as a punishment. But we all recognize that the death penalty is, at present, part of that system, and a highly visible one. And we all agree that if there

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13. *Innocence Protection Act of 2000: Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime*, 106th Cong. 188-89 (2000).

14. *Protecting the Innocent: Proposals to Reform the Death Penalty: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (2002).

is to be a death penalty, it is paramount that capital punishment be administered by a process that is free of any hint of unfairness. Perceived unfairness in the administration of the death penalty will have an adverse impact on public support for the entire structure of our criminal law.

We take note of indications of public concern that the death penalty is not fairly administered, including concerns that defendants may have been wrongfully convicted, and that the death penalty is applied unevenly.[15] Public concern about the administration of the death penalty is reflected in the decision of two states – Illinois and Maryland – to implement moratoriums on the execution of capital sentences, even for defendants whose convictions and sentences have survived the appellate and post-conviction process.[16] Moreover, public

15. Public opinion research polls since mid-2000 have reported significant public concern with the fairness in the administration of the death penalty. *See, e.g.*, Gallup News Service Poll, May 20, 2002 (only 53% of those polled believe the death penalty is applied fairly, and 40% say it is applied unfairly) (available at http://www.gallup.com/poll/releases/default.asp?YR=2002&MO=5); Harris Interactive Poll, July 20-25, 2001 (94% of Americans believe innocent people are sometimes convicted of murder and that on average, 12% of those convicted of murder are innocent) (available at http://www.harrisinteractive.com/harris_poll/index.asp?PID=252); ABC News Poll, April 24, 2001 (67% of Americans believe the death penalty is unfair because of mistaken executions) (available at http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/050301deathpoll.htm); NBC/Wall Street Journal Poll, July 28, 2000 (42% of voters think the death penalty is not applied fairly) (available at http://www.pollingreport.com/crime.htm); CNN/USA Today/Gallup Poll, June 23-25, 2000 (80% of Americans believe an innocent person has been executed in the United States in the past five years) (available at http://www.pollingreport.com/crime.htm).

16. The Governors of Illinois and Maryland both cited questions about fairness in the administration of the death penalty in declaring

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concern about the fairness with which the death penalty is administered could translate into unwillingness on the part of jurors to convict guilty defendants or to follow the law.

To the extent that the Fourth Circuit's decision suggests that inadequate performance in a death penalty case can be excused, we are concerned that it does not redound to the credit of the system. A strong statement from this Court that it will not condone or excuse substandard performance in death penalty representation will enhance public confidence in the criminal justice system.

C. Prosecutors Expect That Defense Counsel Will Conduct and Present a Thorough Mitigation Defense in a Death Penalty Sentencing Proceeding

As this Court noted in *Williams v. Taylor*, 529 U.S. 362, 396 (2000), counsel in a death penalty case has an "obligation to conduct a thorough investigation of the defendant's background." Since this Court reaffirmed the constitutionality of the death penalty in *Gregg v. Georgia*, 428 U.S. 153 (1976), prosecutors have come to expect that this investigation is part of the defense function in a capital

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moratoriums. *See* Statement of Governor George H. Ryan (Jan. 31, 2000) (available at www.state.il.us/gov/press/00/jan/morat.htm); Statement of Governor Parris R. Glendening (May 9, 2002) (available at http://www.gov.state.md.us/gov/press/2002/may/html/ baker.html). *See also* J. Kircheimer, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 43-48 (2002) (noting that the Nebraska and New Hampshire legislatures had also enacted moratorium legislation, although these bills were vetoed by governors of those states, and that similar measures were being considered in a wide variety of jurisdictions).

case and that defense counsel will undertake it seriously. This obligation stems from the importance of a fact-finder's consideration of mitigating evidence in ensuring that the death penalty is imposed only when appropriate under the law. As this Court has written, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) and *Eddings v. Oklahoma*, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)) (internal punctuation omitted).[17] Thus, the Judicial Conference concluded that the work of "[p]enalty phase investigators . . . is part of the existing 'standard of care' in a federal death penalty case." JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.7 (1998).

Prosecutors thus expect that any lawyer who is defending a client facing the death penalty will conduct a thorough, vigorous investigation of any potential mitigating evidence, and, barring extraordinary circumstances, will make any such

17. *See, e.g.*, *Hitchcock v. Dugger*, 481 U.S. 393, 398-99 (1987) (reversing death sentence where jury instruction limited mitigating factors jury could consider); *Skipper v. South Carolina*, 476 U.S. 1, 4-8 (1986) (reversing death sentence where trial court excluded mitigating evidence as irrelevant); *Eddings*, 455 U.S. at 113-16 (reversing death sentence where sentencing judge refused to consider mitigating evidence); *Lockett*, 438 U.S. at 604-08 (plurality opinion) (reversing death sentence and striking down Ohio death penalty statute where statute limited mitigating evidence sentencing judge could consider).

evidence known to the jury at the sentencing phase of the proceeding. The expectation that defense counsel will conduct a thorough investigation of mitigating evidence is also reflected by many federal and state courts which have concluded that counsel's failure to investigate mitigating evidence thoroughly in preparation for a sentencing hearing in a death penalty case constitutes ineffective assistance of counsel.[18] Indeed, the investigation of mitigating evidence

18. *See, e.g.*, *Hall v. Washington*, 106 F.3d 742, 746, 749-50 (7th Cir. 1995) (failure to interview potential mitigation witnesses is inadequate; "counsel must at least take the time to contact those witnesses and determine for himself whether their testimony would be helpful"); *Baxter v. Thomas*, 45 F.3d 1501, 1514-15 (11th Cir. 1995) (counsel was ineffective for failing to take any steps to uncover mental health mitigating evidence that was readily available); *Kenley v. Armontrout*, 937 F.2d 1298, 1304, 1307-08 (8th Cir. 1991) ("counsel must exercise reasonable diligence to produce exculpatory evidence and strategy resulting from lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. . . . Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy"); *Brewer v. Aiken*, 935 F.2d 850, 857 (7th Cir. 1991) ("defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he did not make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury", and thus was ineffective) (internal quotations omitted); *Middleton v. Dugger*, 849 F.2d 491, 494 (11th Cir. 1988) ("mitigating evidence [relating to defendant's mental diseases] was readily discoverable had trial counsel performed a reasonable background investigation, and his failure to marshal this already existing mitigating evidence was outside the range of professionally competent assistance"); *In re Marquez*, 822 P.2d 435, 443, 447 (Cal. 1992) (holding that counsel's performance was deficient because "there was no penalty phase investigation conducted in this case with respect to petitioner's character, background, and conduct as a youth"); *Hildwin v. Dugger*, 654 So. 2d 107, 109 (Cont'd)

is so central to the administration of the death penalty that the federal government requires prosecutors to consider potential mitigating evidence in requesting authorization to seek the death penalty. The Department of Justice's *United States Attorney's Manual* provides that:

> In determining whether or not the Government should seek the death penalty, the United States Attorney, the Attorney General's Committee, and the Attorney General must determine whether the statutory aggravating factors applicable to the offense any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death . . . . [A]ny mitigating factor reasonably raised by the evidence should be deemed established and weighed against the provable aggravating factors. . . . The authorization process is designed to promote consistency and fairness.

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(Fla. 1995) ("trial counsel's sentencing investigation was woefully inadequate. . . . For example, trial counsel was not even aware of Hildwin's psychiatric hospitalizations and suicide attempts"); *People v. Perez*, 592 N.E.2d 984, 995 (Ill. 1992) (concluding that defense counsel's "failure to investigate defendant's background with the information [defense counsel] possessed" fell "below an objective standard of reasonableness"; defense counsel had school records containing the name of family members and qualified school psychologists and had a conviction record; yet counsel "failed to investigate any of this information or send his court-appointed investigator to investigate. . . ."); *Louisiana v. Sanders*, 648 So.2d 1272, 1293 (La. 1994) ("counsel's failure to prepare at all for the penalty phase . . . resulted in advocacy for the defendant that was tepid and virtually non-existent") (internal quotation omitted).

UNITED STATES DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-10.080. *See also* UNITED STATES DEPARTMENT OF JUSTICE, CRIMINAL RESOURCE MANUAL §§ 74-83 (requiring evaluation of potential statutory and nonstatutory mitigating factors in requesting authorization from the Department of Justice to seek the death penalty).

Given this consensus about the importance of a thorough investigation by defense counsel into mitigating factors, the Fourth Circuit's suggestion that a duty to investigate does not exist, 288 F.3d at 640-41, cannot be accepted. Permitting defendants to be convicted and sentenced to death when their counsel have not adequately investigated potential mitigating circumstances would be contrary to the prior holdings of this Court and would undermine public confidence in the process by which those convictions are secured. It would thus run contrary to important prosecutorial interests. Accordingly, we urge the Court to reaffirm its holding in *Williams v. Taylor* that a full investigation into potential mitigating circumstances is an essential aspect of the effective assistance of counsel in a death penalty case.

II. PROPER PRESENTATION AND INVESTIGATION OF MITIGATION EVIDENCE CAN SIGNIFICANTLY REDUCE COSTS ON LAW ENFORCEMENT

Effective representation by defense counsel at trial (including proper investigation of mitigating evidence by defense counsel in a capital case) promotes more efficient management of the scarce public resources that fund the criminal justice system. This is evident for two reasons.

First, if defense counsel's performance meets constitutional standards during pre-trial and trial proceedings, the costs associated with the appeal, post-conviction

proceedings, and possible re-trials will be lessened. Prosecutors will not have to expend effort defending the performance of the defendant's trial counsel on appeal, nor will they have to engage in expensive post-conviction evidentiary hearings that recreate both the original trial and defense counsel's strategic decisions. Post-conviction proceedings in capital cases are complex, particularly when they involve *Strickland* claims, and typically involve many constitutional and procedural issues; these issues may be revisited in evidentiary hearings in both state and federal courts, each of which has its own appellate process. As a result, post-conviction proceedings are expensive – in some cases more expensive than the original trial.[19]

Moreover, this collateral litigation – which typically occurs several years after the original conviction – often requires significant involvement of the prosecutors and law enforcement personnel who handled in the original proceeding. This can place tremendous burdens on prosecutorial resources. As the Subcommittee on Federal Death Penalty Cases of the Judicial Conference noted, "a number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of 'doing it right the first time,' i.e., minimizing time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level."

19. *See, e.g.*, Philip J. Cook & Donna B. Slawson, *The Costs of Processing Murder Cases in North Carolina* (May 1993) at 47, 64-66 (noting that average bifurcated capital trial cost $84,099, average appeal from death sentence costs $22,484, and two post-conviction proceedings cost an average of $254,890); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1257 (1985).

JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § I.C.1 (1998).

These costs can be limited if defense counsel performs competently during the original proceeding. When counsel for the defendant fulfils their obligations at trial and at sentencing, review of legal issues on direct appeal and in post-conviction proceedings can be more straightforward, conserving tremendous resources.

Second, investigation of mitigating evidence by defense counsel can also conserve resources by helping prosecutors determine at the outset which cases are appropriate under the law for capital sentencing. For example, in the federal system, defense counsel is allowed to make a proffer of mitigating evidence to the prosecutor.[20] A thorough investigation of mitigating evidence by defense counsel at an early stage can uncover facts demonstrating that the death penalty is not appropriate under the law of a particular jurisdiction. As numerous studies have concluded, a murder trial where the death penalty is sought is typically several times as costly as one where it is not.[21] Accordingly, any

20. In seeking the death penalty, the U.S. Attorney must submit a "Death Penalty Evaluation Form," a memorandum, and any written material submitted by defense counsel in opposition to the imposition of the death penalty to the Assistant Attorney General for the Criminal Division. United States Department of Justice, *United States Attorney's Manual* § 9-10.040.

21. A study by a subcommittee of the Judicial Conference found that from 1990 to 1997 the average costs were about four times greater in cases where the death penalty was sought than in comparable cases

(Cont'd)

mitigating evidence that defense counsel is able to bring to the prosecutor's attention prior to trial that leads the prosecutor to decide not to seek the death penalty will conserve resources, as well as ensuring that the death penalty is fairly and properly administered. As the Subcommittee on Federal Death Penalty Cases of the Judicial Conference of the United States noted:

> A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. . . . The process for identifying those defendants should be as expeditious as possible in order to preserve funding and minimize the unnecessary expenditure of resources.

JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION § II.5 (1998). Obviously, defense counsel who does not investigate mitigating evidence cannot present it.

The importance of these cost savings should not be underestimated. State and local governments are facing a financial crisis of staggering proportions.[22] To a county or

(Cont'd)
where it was not sought. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON DEFENDER SERVICES, SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (1998).

22. *See, e.g.*, R. Gold & R. Gavin, *Falling Short: Fiscal Crises Force States to Endure Painful Choices*, WALL ST. J., Oct. 7, 2002, (Cont'd)

city in straitened circumstances, a capital case – in which it typically must fund both the prosecution and the defense – can impose a major financial burden.[23] Effective defense counsel can play an important role in ensuring that those costs are incurred only when appropriate under the law, and can help free up scarce prosecutorial and law enforcement resources to focus on combating additional crime.

(Cont'd)
at A1 (noting combined state budget deficit is $58 billion); W. Eggers, *Memo to Rookie Governors: Cut, Cut, Cut*, WALL ST. J., Nov. 6, 2002, at A22.

23. The burden can be substantial. *See, e.g.*, R. Gold, *Counties Struggle with High Cost of Prosecuting Death-Penalty Cases*, WALL ST. J., Jan. 9, 2002, at B1:

> As a growing number of local governments are discovering. . . . [j]ust prosecuting a capital crime can cost an average of $200,000 to $300,000. . . . Add indigent-defense lawyers, an almost-automatic appeal and a trial transcript, and death-penalty cases can easily cost many times that amount. . . . The cost, county officials say, can be an unexpected and severe budgetary shock—much like a natural disaster. . . . To pay up, counties must raise taxes, cut services, or both.

A. Liptak, *Citing Cost, Judge Rejects Death Penalty*, N.Y. TIMES, Aug. 18, 2002, at 18 (citing the county's inability to afford a capital trial, a judge in Vinton County, Ohio prevented prosecutors from seeking the death penalty against the alleged murderer of a college student); L. Olsen, *State Fund Doesn't Provide Much Relief From Costs of Capital Cases*, Seattle Post-Intelligencer, Aug. 8, 2001, at A8 (noting that in one county in Washington State, the cost of one capital murder trial was $15 per resident).

CONCLUSION

Like the country as a whole, the signatories of this brief have differing views on the death penalty, but all agree that if we are to have a death penalty, it must be administered fairly and with competent defense counsel. As prosecutors, we all agree that an essential aspect of competent performance by defense counsel is that defense counsel must adequately investigate mitigating circumstances. For the reasons set forth herein, *amici* respectfully request that the Court reverse the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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(6)

No. 02-311

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Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

v.

SEWALL SMITH, WARDEN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE CONSTITUTION PROJECT AS AMICUS CURIAE SUPPORTING THE PETITIONER

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INTEREST OF AMICUS CURIAE

The Constitution Project respectfully submits this brief in accordance with Supreme Court Rule 37.3.[1] The Constitution Project is a nonprofit bipartisan organization that seeks to build consensus and develop solutions to contemporary legal and constitutional issues through a unique combination of scholarship and public education.[2] The mission of the Constitution Project is to promote constitutional dialogue in settings outside the judiciary.[3] To further this mission, the Project creates bipartisan

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[1] The parties consented to the filing of this brief, and copies of the parties' written consents have been filed with the Clerk of the Court. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus curiae, its members, and counsel made a monetary contribution toward the preparation or submission of this brief.

[2] The text describing the Constitution Project, its mission and initiatives, was largely taken directly from its website and publications. *See* http://www.constitutionproject.org (last visited Jan. 6, 2003).

[3] The basic premise of the Constitution Project is that in the practice of ordinary politics constitutional issues are neglected, and there is an over reliance on the courts to resolve constitutional debates. All too often, legislators and executive officers assume that the theoretical existence of judicial review means that they need not think in a serious way about constitutional issues. Responsibility for constitutional debates and decision-making rests not only with the courts, but also with elected officials. Yet often, legislators are heard to advocate "letting the courts decide" whether proposed legislation is constitutional. Exclusive reliance on judicial review ignores that our Constitution ultimately stems from – and belongs to – the people as a whole. In the long run, the Constitution cannot be preserved as a relevant influence on our politics and policies unless the people are regularly engaged in constitutional discourse and decision-making. As Americans, we are all decision-makers when it comes to the Constitution, and the Project empowers citizens to make the decisions our democratic system demands of them and it reminds them of the ways and extent to which our Constitution matters.

blue-ribbon committees comprised of former government officials, judges, scholars, and other prominent citizens to reach across ideological and partisan lines, and divides among the executive, judicial, and legislative branches. The committees seek to build consensus on issues that the courts cannot resolve, and to develop guidelines designed to make constitutional issues a part of ordinary political debate. Then, based on these consensus positions, the Project promotes public education and grassroots efforts to encourage serious constitutional dialogue in a variety of settings.[4]

A. The Death Penalty Initiative

In May 2000, the Constitution Project created the Death Penalty Initiative to address the disturbing risk that Americans were being wrongfully convicted of capital crimes and sentenced to death.[5] A thirty member blue-ribbon committee was convened to examine the current capital systems in place throughout the country and recommend ways to ensure fundamental fairness and justice for all by improving procedural safeguards. The members of the committee are supporters and opponents

[4] The Constitution Project currently has five active programs: The Liberty and Security Initiative; The Death Penalty Initiative; The Election Reform Initiative; The Courts Initiative; and The Constitutional Amendments Initiative.

[5] Since the death penalty was reinstated in 1976, one hundred and two persons sentenced to death were later exonerated, while eight hundred and twenty were executed. *See generally* BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. 197020, CAPITAL PUNISHMENT 2001 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf.

of the death penalty, Democrats and Republicans, conservatives and liberals, former judges, prosecutors, defense lawyers, public officials, scholars, journalists, victim advocates, and other concerned Americans.[6] The members

[6] The following persons comprised the committee: Virginia E. Sloan, *Executive Director, the Constitution Project*. **Co-Chairs:** The Honorable Charles F. Baird, *former Judge, Texas Court of Criminal Appeals*; The Honorable Gerald Kogan, *former Chief Justice, Supreme Court of the State of Florida and former Chief Prosecutor, Homicide and Capital Crimes Division, Dade County, Florida*; Beth A. Wilkinson, *Prosecutor, Oklahoma City bombing case*. **Members:** The Reverend James E. Andrews, *Stated Clerk (retired), Presbyterian Church (U.S.A.)*; William G. Broaddus, *former Attorney General, Commonwealth of Virginia*; David I. Bruck, *Capital Defense Counsel*; The Honorable Robert J. Burns, *retired Judge, Jefferson Parish, Louisiana*; W. J. Michael Cody, *former Attorney General, State of Tennessee*; The Honorable Mario M. Cuomo, *former Governor, State of New York*; The Honorable John J. Gibbons, former *Chief Judge, U.S. Court of Appeals for the Third Circuit*; Thomas A. Gottschalk, *General Counsel, General Motors Corporation*; Charles A. Gruber, *former President, International Association of Chiefs of Police*; Cardinal William H. Keeler, *Archbishop of Baltimore*; Paula M. Kurland, *Victim Advocate and Office Manager, Crime Prevention Institute*; David Lawrence, Jr., *President, Early Childhood Initiative Foundation and former Publisher, Miami Herald and Detroit Free Press*; Timothy Lynch, *Director, Project on Criminal Justice, Cato Institute*; The Honorable Abner J. Mikva, *former Member of Congress (D-IL), former Chief Judge, U.S. Court of Appeals for the D.C. Circuit, and former White House Counsel, Clinton administration*; Sam D. Millsap, Jr., *former District Attorney, Bexar County, San Antonio, Texas*; The Honorable Sheila M. Murphy, *former Judge, Sixth District, State of Illinois; Executive Director, Illinois Death Penalty Education Project*; Dr. LeRoy Riddick, *Forensic Pathologist*; Chase Riveland, *former Secretary, Department of Corrections, State of Washington*; Laurie O. Robinson, *former Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Clinton administration*; The Honorable Kurt L. Schmoke, *former Mayor, City of Baltimore, Maryland and former State's Attorney, State of Maryland*; The Honorable William S. Sessions, *Director, Federal Bureau of Investigation, Reagan and Bush administrations and former Chief Judge, U.S. District Court for the Western District of Texas*; G. Elaine Smith, *Past*

(Continued on following page)

brought a wide array of philosophies, experiences, and perspectives to the committee.

The committee's mission statement provides that individuals who commit violent crimes deserve swift and certain punishment. All the committee members agreed that no one should be denied basic constitutional protections, including a competent lawyer, a fair trial, and full judicial review of conviction and sentence. The denial of any of these protections heightens the danger of wrongful conviction and sentence.

The committee found that the dramatic increase in the number of persons released from death row because they were innocent deeply disturbing. The committee determined that too often, cases of wrongful conviction involve defense lawyers who lacked the appropriate experience and resources, were under the influence of

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President, American Baptist Churches, USA; Jennifer Thompson, *Spokesperson, Center on Wrongful Convictions*; The Honorable Vin Weber, *former Member of Congress (R-MN)*; John W. Whitehead, *President, The Rutherford Institute*; Rabbi Eric H. Yoffie, *President, Union of American Hebrew Congregations*. Individual member biographies can be found at http://www.constitutionproject.org/dpi/members.html. **Reporters:** Professor Susan Bandes, *DePaul University College of Law, Chicago, IL*; Professor Robert P. Mosteller, *Duke University School of Law, Durham, NC*; Professor Stephen Saltzburg, *The George Washington University Law School, Washington, DC*. **Social Science Consultant:** William J. Bowers, Ph.D., *College of Criminal Justice, Northeastern University, Boston, MA*. **Contributors:** Time and funds were generously contributed by the law firm of Latham & Watkins; Professor Samuel Gross, *the University of Michigan Law School*; James Liebman, *Columbia Law School*; Thomas Kerner and Marlaine Williams of the law firm of William Cutler & Pickering; the Open Society Institute; Deer Creek Foundation; Arca Foundation; Columbia Foundation; and Vietnam Veterans of America Foundation.

alcohol or drugs, or simply slept through parts of the trial. The number of defense lawyers involved in capital cases who were subsequently disbarred or cited for serious ethical violations is shockingly high. The flaws in the current system have been illuminated by scientific advances in DNA evidence, but that society cannot be assured that the current system, even with DNA evidence, can catch or correct all errors.

Finally, the committee concluded that the current system serves no one adequately – not the victims, not defendants, and not society. The systems' delays and mistakes prevent victims from experiencing finality and closure. Moreover, when the innocent are convicted, we fail to bring justice to the guilty, creating a continued threat to public safety and an enduring tragedy for the victim's family.

The goal of the Death Penalty Initiative is to recommend additional safeguards to an existing system that is unable to prevent errors and injustices. Several of the recommendations are addressed to those who occupy critical roles in the capital punishment system, including the defense attorneys, the prosecutors, the juries, the trial judges, and the reviewing courts. The recommendations emphasize that each person has the individual responsibility to ensure that justice is done in all cases.

B. The Death Penalty Initiative's Eighteen Reforms

The committee issued a report suggesting eighteen reforms essential to a death penalty system founded on fairness and justice. Three of the Eighteen Reforms deal with the competency of counsel and will be mentioned

here.[7] First and foremost, counsel should be effective. Jurisdictions that impose capital punishment should create an independent authority to screen, train, supervise, and appoint lawyers to represent defendants charged with a capital crime.[8] Second, capital defense lawyers should be adequately compensated, and the defense should be provided with adequate funding for experts and investigators. Third, the Supreme Court should replace the *Strickland* standard with a standard requiring professional competence in death penalty representation.

STATEMENT OF THE CASE

Amicus adopts the statement of the Petitioner, except to emphasize a few important facts the Court should consider in reaching its final decision in this case.

The lead defense attorney in this case, just after being appointed, had taken a new job in another Maryland county.[9] Thereafter, the lead attorney spent little time on the case, and left an attorney in charge who had only worked on a few felony trials and never on a death penalty

[7] To read about the remaining fifteen reforms and for a copy of the full text of the Project's suggested "Eighteen Reforms" *see* http://www.constitutionproject.org/dpi/MandatoryJustice.pdf (last visited Jan. 6, 2003).

[8] *See infra* note 33 (regarding the Illinois Capital Bar and qualifications for certification to try capital cases).

[9] Joint Appendix (JA) 472-476. The lead attorney was later discharged from his position as a public defender. *Id.*

trial.[10] After trial but before sentencing, both attorneys failed to conduct any meaningful investigation into potential mitigating evidence, despite the fact that it is "a routine practice in the Maryland Public Defender's Office," and that funds were available to hire an expert to prepare a social history.[11] Rather, each of the attorneys thought the other was responsible for investigating and preparing a mitigating case.[12] Thus, the attorneys, without any investigation, made the decision to "re-try guilt" to the sentencing jury.[13] However, that decision was ill-advised because the sentencing jury was repeatedly instructed that Wiggins "had been found guilty of the murder of Florence Lacs in the first degree."[14]

Had counsel bothered to conduct a sufficient investigation for mitigating evidence, they would have found evidence that comported with and supported the argument that Wiggins lacked sufficient culpability to impose the death penalty. Counsel would have found that Wiggins was "borderline intelligent" and possibly mentally retarded.[15] Also, counsel would have discovered the details of

[10] JA 472-478, 485, 514-15.

[11] JA 472-478, 485-88, 514-15, 539-40.

[12] JA 472-488, 514-40. *See also Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 538-39 (D. Md. 2001).

[13] JA 472-478, 485-88, 514-15, 539-40. The decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486.

[14] JA 53, 362. Also, the jury was instructed that: "This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact." JA 362.

[15] JA 437-439.

Wiggins' horrific childhood, including physical and sexual abuse.[16] Additionally, counsel should have introduced evidence showing Wiggins had no prior criminal record.[17]

SUMMARY OF ARGUMENT

The Court of Appeals of Maryland unreasonably applied *Strickland* to the facts of this case. Counsel's performance in this case was deficient under *Strickland* by failing to conduct a sufficient investigation into potential mitigating evidence. Wiggins' case was prejudiced by the failure to investigate and introduce the available mitigating evidence, as the outcome of the sentencing hearing probably would have been different.

ARGUMENT

I. The Maryland Court Unreasonably Applied *Strickland*

As 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act, applies to this case, the question presented is whether the Maryland Court of Appeals' conclusion "resulted in a decision that is contrary to, or an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 403-13 (2000) (Opinion for the Court in Part

[16] JA 425-443.

[17] JA 17-24.

II by O'Connor, J.). *Strickland v. Washington*, 466 U.S. 668 (1984), was clearly established federal law at the time Wiggins was convicted. The Maryland Court of Appeals unreasonably applied *Strickland* by concluding that counsel's performance was not ineffective despite the failure to investigate available mitigating evidence. *Williams*, 529 U.S. at 391-98.

A. Competent Capital Counsel Is Required to Conduct an Adequate Investigation to Locate and Evaluate Potential Mitigating Evidence

There is a difference between a decision not to *introduce* or *present* mitigating evidence and a decision to simply forgo *investigation* of mitigating evidence. *See Strickland*, 466 U.S. at 699 (finding "the decision not to seek *more* character or psychological evidence" reasonable) (emphasis added); *Darden v. Wainwright*, 477 U.S. 168, 184-86 (1986) (finding "counsel engaged in extensive preparation ... for sentencing" by investigating and consulting with defendant to determine what, if any, mitigating evidence should be presented); *Burger v. Kemp*, 483 U.S. 776, 791 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interests would not be served by *presenting* this type of evidence.") (emphasis added); *Williams*, 529 U.S. at 390-99; *Bell v. Cone*, 122 S.Ct. 1843, 1852-53 (2002).

This Court's decision in *Williams* underscored the existing *Strickland* requirement that counsel in capital cases adequately investigate available mitigating evidence

prior to making a decision to forgo further investigation or not to introduce such evidence in the sentencing hearing.[18] In *Williams*, the petitioner asserted counsel erred in failing to actually investigate and seek records on the erroneous assumption that state law prevented it. *Williams*, 529 U.S. at 369-71. Counsel simply half-heartedly requested the jury show the petitioner mercy. *Id.* Thus, in *Williams*, this Court applied *Strickland* and concluded that counsel's performance was deficient for *failing to investigate* and uncover significant mitigating evidence.

Counsel's failure to investigate the existence of mitigating evidence prejudices a defendant by preventing the jury from considering mitigating evidence which is essential to the fundamental fairness of a capital proceeding. *See Enmund v. Florida*, 458 U.S. 782, 801 (1981); *Lockett v. Ohio*, 438 U.S. 586, 605-06 (1978) (plurality opinion) (opinion of Burger, C.J.); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (holding that in capital proceedings, the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense"). The jury is not only permitted but *required* to contemplate the "uniqueness of the individual"

[18] By contrast, in *Bell*, this Court found that counsel pursued a reasonable strategy after *completing an adequate investigation*. *Bell*, 122 S.Ct. at 1852-53. In *Bell*, petitioner claimed error not in counsel's failure to locate and evaluate mitigating evidence; rather, petitioner claimed counsel's performance was deficient for not *recalling* mitigating witnesses who had testified the day before. *Id.* Further, counsel considered the content and potential effect of the available evidence and testimony, and after consultation with the petitioner, elected to pursue a strategy which did not include recalling mitigation witnesses and introducing additional evidence. *Id.*

in determining the penalty. *Eddings v. Oklahoma*, 455 U.S. 104, 110-12 (1982) ("[N]either may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.") (emphasis in original). An attorney's failure to conduct an investigation into those unique attributes of the individual defendant makes the jury's task impossible, as they have no evidence to weigh. The Maryland Court of Appeals' decision to the contrary is clearly an unreasonable application of this Court's precedent. *See Bell*, 122 S.Ct. at 1852-53; *Williams*, 529 U.S. at 390-99; *Burger*, 483 U.S. at 791; *Strickland*, 466 U.S. at 699.

B. Most Courts of Appeals and State Supreme Courts Interpreting *Strickland* Require That Counsel Undertake a Sufficient Investigation for Mitigating Evidence Before Making the Decision to Forgo Additional Investigation or Not Introduce Mitigating Evidence

The vast majority of Federal Courts of Appeals and State Supreme Courts, applying *Strickland*, have required that defense counsel perform a sufficient investigation for mitigating evidence before they will find counsel's decision to forgo additional investigation or not to introduce any mitigating evidence was a tactical decision. Choosing to do nothing in a capital sentencing proceeding is not a constitutionally permissible tactic. Where counsel has notice of *potential* mitigating evidence, but fails to investigate,

counsel has inadequately prepared for sentencing.[19] Counsel cannot weigh the value of presenting a mitigation defense *before* actually investigating the available evidence.[20] Thus, these courts have concluded that the failure to perform a sufficient investigation renders counsel's performance constitutionally ineffective.

There is no question that in some cases, the presentation of mitigating evidence opens the door to harmful aggravating evidence that would more than counteract any benefit the mitigating evidence would have provided.[21]

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[19] *See Moore v. Johnson*, 194 F.3d 586, 615 (5th Cir. 1999) ("*Strickland* does not, however, require deference to decisions that are not informed by an adequate investigation into the controlling facts and law."); *accord Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002); *Lockett v. Anderson*, 230 F.3d 695, 711-14 (5th Cir. 2000); *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997); *cf. Hunt v. Lee*, 291 F.3d 284, 292 (4th Cir. 2002) (acknowledging that in some cases it is the "failure to *investigate*, not the failure to *present*, mitigating evidence that [leads] to the conclusion that the defendant ha[s] been denied effective assistance of counsel.").

[20] In this case, the decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486. *See Lockett*, 230 F.3d at 714-15 (rejecting the state's contention that the decision not to investigate was a "strategic choice," because the purported choice was not informed by an adequate investigation of the available evidence); *accord Neal v. Puckett*, 286 F.3d 230, 243-44 (5th Cir. 2002) (en banc); *Ainsworth v. Woodford*, 268 F.3d 868, 874 (9th Cir. 2001); *Delaware v. Wright*, 653 A.2d 288, 299 (Del. 1994); *Rose v. Florida*, 675 So.2d 567, 572 (Fla. 1996); *Phillips v. Florida*, 608 So.2d 778, 783 (Fla. 1992); *Turpin v. Christenson*, 269 Ga. 226, 239 (1998); *Illinois v. Morgan*, 187 Ill.2d 500, 541 (1999); *Hodge v. Kentucky*, 68 S.W.3d 338, 344 (Ky. 2002); *Louisiana v. Sanders*, 648 So.2d 1272, 1293 (La. 1994); *Pennsylvania v. Smith*, 544 Pa. 219, 244-45 (1996); *Good v. Tennessee*, 938 S.W.2d 363, 370 (Tenn. 1996).

[21] *See Burger*, 483 U.S. at 792-93; *Fortenberry v. Haley*, 297 F.3d 1213, 1229-30 (11th Cir. 2002). In these cases, however, for the court to

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However, this case is unlike those cases in which counsel declined to present mitigating evidence because it might open the door to aggravating evidence. In this case, there was no possibility of opening the door to aggravating evidence, as Wiggins had no prior criminal record.[22]

Mitigating evidence is crucially important to humanize the defendant and ensure that he receives a proportionate sentence.[23] At the time defense counsel made the decision to not investigate mitigating evidence, they had no reason to believe that mitigating evidence would not have been a viable strategy.[24] Rather, counsel chose to present *existing* evidence relating to guilt, instead of

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find that counsel's assistance was effective, defense counsel was required to identify the specific mitigation evidence it would have used, and to identify the specific aggravating evidence that would have been admitted to rebut it. *See Foster v. Schomig*, 223 F.3d 626, 632-36 (7th Cir. 2000); *Moore*, 194 F.3d at 617; *Dobbs v. Turpin*, 142 F.3d 1383, 1388-89 (11th Cir. 1998).

[22] JA 17-24.

[23] *See, e.g., Bracy v. Schomig*, 286 F.3d 406, 417 (7th Cir. 2002) (en banc) ("[E]vidence in mitigation is crucially important in death penalty litigation."); *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir. 2001) ("Mitigating evidence plays an overwhelmingly important role in the just imposition of the death penalty.") (internal quotations omitted). And the Courts of Appeals have found that when counsel has knowledge of potential mitigation evidence, counsel must conduct further investigation in order to be determined "effective" under *Strickland*. *See, e.g., Neal*, 286 F.3d at 236-38; *Coleman v. Mitchell*, 268 F.3d 417, 451 (6th Cir. 2001); *Mayfield v. Woodford*, 270 F.3d 915, 927-28 (9th Cir. 2001); *Stouffer v. Reynolds*, 168 F.3d 1155, 1167 (10th Cir. 1999); *Emerson v. Gramely*, 91 F.3d 898, 907 (7th Cir. 1997); *Hill v. Lockhart*, 28 F.3d 832, 845 (8th Cir. 1994); *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994).

[24] The decision to re-try guilt in the mitigation phase, according to the lead attorney, was actually made before any evidence was presented in the guilt/innocence trial. JA 485-486.

conducting an investigation to determine what mitigating evidence existed.

II. Counsel's Deficient Performance Prejudiced The Defendant

A death penalty proceeding consists of *two* trials, one for guilt and the other for sentencing. *E.g.*, *Strickland*, 466 U.S. at 686-87 ("A capital sentencing proceeding ... is sufficiently like a trial in its adversarial format and the existence of standards for a decision, that counsel's role in the proceeding is comparable to counsel's role at trial.") (internal citations omitted); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) ("[T]he capital sentencing proceeding is similar to a trial in its adversarial format and counsel's role is similar."). Rather than investigate the existence or substance of possible mitigating evidence for the sentencing trial, counsel in this case simply re-tried guilt because doing so required no additional work or effort. Counsel was unprepared for the sentencing (second) trial, as counsel abdicated the responsibility to prepare a case in mitigation.[25] Counsel's deficient performance prejudiced Wiggins as the evidence counsel failed to investigate and present had a "reasonable probability" of producing a different result in the sentencing proceeding.

[25] *See supra* notes 19-24.

A. A Decision Not to Investigate Mitigating Evidence Is Not a Tactical Decision, Rather It Is No Decision at All

The wholesale failure to mount a sufficient investigation for mitigating evidence in this case rendered counsel's performance deficient.[26] While under *Strickland,* defense counsel is not required to conduct a *complete* investigation of every possible avenue of defense, counsel has a duty to at least conduct a *sufficient* investigation and determine the content of available mitigating evidence. *See Strickland*, 460 U.S. at 690-91 ("[C]ounsel has a duty to make reasonable investigations"); *Williams*, 529 U.S. at 371 ("Counsel's failure to discover and present this and other significant mitigating evidence was 'below the range expected of reasonable, professional competent assistance of counsel.'") (citation omitted).[27] In no court proceeding does a party have more at stake than the defendant in a capital sentencing hearing, and accordingly, courts must be particularly vigilant in ensuring that capital defendants receive adequate legal counsel.[28] In this case,

[26] The failure to conduct an investigation and determine available sources of mitigating evidence prior to making a decision on whether or not to present such evidence should always be considered deficient performance by counsel in a capital case.

[27] *See supra* notes 19-24.

[28] *See Duckett v. Mullin*, 306 F.3d 982, 997 (10th Cir. 2002) (The "duty to conduct a reasonable investigation is particularly important with respect to the sentencing phase of a capital trial, and we have recognized a need to apply even closer scrutiny when reviewing attorney performance during the sentencing phase of a capital case.") (quotation marks and citations omitted); *accord St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) ("[T]his circuit has held defense counsel to a higher standard at the sentencing phase where death is a possible sentence."). A higher level of scrutiny is necessary because "[t]he

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however, counsel was generally aware of potential avenues of mitigation, but failed to investigate or determine the substance of mitigating evidence available for the sentencing phase. The Maryland Court of Appeals erroneously found this to be a "reasonable professional judgment," a holding that is inconsistent with decisions of this Court, and many decisions of the Courts of Appeals and State Supreme Courts interpreting and applying the same law in similar circumstances.[29]

1. The standard of requiring a "reasonable" investigation is guided by the relevancy and admissibility of such evidence in the sentencing phase

Counsel is required to undertake a "reasonable investigation" into potential mitigating evidence "supported by reasoned professional judgment." *Burger*, 483 U.S. at 788-96. Because of the unique nature of the capital sentencing hearing, counsel must at least *unearth* a

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sentencing stage is the most critical phase of a death penalty case." *Cooks v. Ward*, 165 F.3d 1283, 1294 (10th Cir. 1998); *accord Lesko v. Lehman*, 925 F.2d 1527, 1541 (3d Cir. 1991). Moreover, it is the proceeding in which counsel's efforts have the greatest chance of making a difference. *See Jermyn v. Horn*, 266 F.3d 257, 308 (3d Cir. 2001) ("[T]he sentencing phase of a capital case is often the stage of the proceedings where counsel can do his or her client the most good[.]"); *Glenn v. Tate*, 71 F.3d 1204, 1207 (6th Cir. 1995); *Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989); *cf. Mayfield*, 270 F.3d at 942 (Hawkins, J., concurring) ("It is a painful truth of the death penalty process that these most serious cases sometimes draw the least adequate trial counsel.").

[29] *See supra* part I and *supra* notes 19-28. *See also Jermyn*, 266 F.3d at 308; *Glenn*, 71 F.3d at 1207; *Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991).

sufficient quantum of mitigating evidence to enable him to make a reasoned judgment that presenting mitigating evidence would be an unavailing strategy. *See Kubat v. Thieret*, 867 F.2d 351, 369 (7th Cir. 1989) ("[C]ounsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and focus the attention of the jury on any mitigating factors.").[30]

The requirement that counsel undertake a "reasonable investigation" must be tailored to the fact that the volume and character of the evidence presentable in a capital sentencing hearing is starkly different than evidence appropriate for trial. *See St. Pierre v. Walls*, 297 F.3d 617, 632 (7th Cir. 2002) ("[N]early anything is admissible in mitigation, regardless of whether it would be admissible at trial."); *Bracy v. Schomig*, 286 F.3d 406, 412-19 (7th Cir. 2002) (en banc) ("[W]e are again mindful that *death is indeed different*" and that "evidence in mitigation is *crucially* important in death penalty litigation.") (emphasis added). The nature of a capital sentencing proceeding – considering the finality of the penalty, the role of the jury, and the admissibility of nearly any possible information – requires fresh and additional efforts on the part of defense counsel to constitute a "reasonable investigation." *See Burger*, 483 U.S. at 822 (Powell, J., dissenting) ("Where information at the sentencing stage in a capital case may be highly relevant, counsel's burden of justifying a failure to investigate or present it is similarly heightened."). The fact that counsel undertook no such efforts in this case

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[30] *See supra* notes 19-29.

demonstrates counsel's actions could not possibly have been "supported by reasoned professional judgment." *Burger*, 483 U.S. at 788-96.

2. Counsel must investigate and determine if evidence exists in several key areas before making a "strategic" decision not to conduct any further investigation or present such evidence

Effective capital counsel must investigate defendant's background for several types of mitigating evidence, including education and mental ability,[31] and family background and upbringing[32] – the same categories of mitigating evidence that were not investigated and presented in Wiggins' case.

a. education and mental ability

Mental retardation and a history of abuse are factors the jury must be allowed to consider. *See Penry v.*

[31] In many cases a writ of habeas corpus has been granted based on counsel's failure to investigate mitigating evidence of a defendant's mental ability. *See, e.g., Brownlee v. Haley*, 306 F.3d 1043, 1074 (11th Cir. 2002); *Caro*, 280 F.3d at 1255; *Coleman*, 268 F.3d at 452; *Jermyn*, 266 F.3d at 310-11; *Lockett*, 230 F.3d at 714; *Glenn*, 71 F.3d at 1209; *Baxter v. Thomas*, 45 F.3d 1501, 1513 (11th Cir. 1995).

[32] Similarly, in many cases a writ of habeas corpus has been granted when counsel failed to investigate evidence of the defendant's family background. *See, e.g., Williams*, 529 U.S. at 395 (counsel failed to investigate "records graphically describing [defendant's] nightmarish childhood); *Neal*, 286 F.3d at 244; *Silva v. Woodford*, 279 F.3d 825, 850 (9th Cir. 2002); *Ainsworth*, 268 F.3d at 878; *Moore*, 194 F.3d at 616; *Dobbs*, 142 F.3d at 1388; *Brewer v. Aiken*, 935 F.2d 850, 858 (7th Cir. 1991).

Lynaugh, 492 U.S. 302, 322-23 (1989); *see also Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995).

b. family background and upbringing

"Evidence of a difficult family history and of emotional disturbance," the type of evidence "typically introduced by defendants in mitigation," cannot be excluded from the jury's consideration. *Eddings*, 455 U.S. at 115; *see also McGautha v. California*, 402 U.S. 183, 187-88 (1971).

c. age

Although not an issue in this case, juries must be allowed to consider evidence of a capital defendant's youth when appropriate. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings*, 455 U.S. at 115-16; *Battle v. Delo*, 19 F.3d 1547, 1558 (8th Cir. 1994).

The failure of counsel to investigate the existence of evidence "typically introduced by defendants in mitigation" is deficient performance because it precludes the jury from rendering the appropriate sentence based on the individual defendant's overall moral culpability. *See Eddings*, 455 U.S. at 115-16.

3. Counsel's actions failed to comport with prevailing professional standards of competent capital counsel throughout the United States and in Maryland

In *Strickland*, this Court stated that counsel's performance is measured, in part, by prevailing professional standards. 466 U.S. at 688 ("The proper measure of attorney performance remains simply reasonableness

under prevailing professional norms."). Some standards for the competency of capital counsel will be clearly pronounced and written,[33] other standards may be unwritten,

[33] Illinois has a "capital bar", setting minimum requirements for counsel to become certified to try capital cases. *See* IL. S.CT. R. 714.

> Lead Counsel – Qualifications
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> (1) Be a member in good standing of the Illinois Bar or be admitted to the practice *pro hac vice*.
>
> (2) Be an experienced and active trial practitioner with at least five years of criminal litigation experience.
>
> (3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois.
>
> (4) Have prior experience as lead or co-counsel in no fewer than eight felony jury trials which were tried to completion, at least two of which were murder prosecutions; and either
>
> (i) have completed at least 12 hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, within two years prior to making application for admission; or
>
> (ii) have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health, pathology and DNA profiling evidence.

In February, 1989, the ABA House of Delegates adopted Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Resolution of the ABA House of Delegates (Feb. 1989). According to the ABA guidelines that were in effect when Wiggins was convicted and sentenced to death in 1989, his attorneys had a duty to investigate "the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction." 1 A.B.A. STANDARDS FOR CRIMINAL JUSTICE (1982 Supp.), No. 4-4.1. This included the "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Defense counsel's decision not to seek additional mitigating evidence by investigating petitioner's family or childhood background was therefore not within the range of professionally reasonable judgments.

but nevertheless apparent. *Id.* at 688-89 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, are guides to determining what is reasonable"). Where the professional norms are "prevailing", either through written requirements or standard procedures, this Court should find that counsel's failure to meet those norms renders their performance deficient. *Cf. Gideon v. Wainwright*, 372 U.S. 335, 340-45 (1963) ("In returning to these old precedents, sounder than we believe the new, we but restore constitutional principles established to achieve a fair system of justice."); *Strickland*, 466 U.S. at 704-05 (Brennan, J., concurring and dissenting) ("Time and time again this Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case."); *accord Powell v. Alabama*, 287 U.S. 45, 71-72 (1932); *Barefoot v. Estelle*, 463 U.S. 880, 913-14 (1936) (Marshall, J., dissenting); *Woodson*, 428 U.S. at 304; *Gardner v. Florida*, 430 U.S. 349 (1977); *Lockett*, 438 U.S. at 605-06 (opinion of Burger, C.J.); *Green v. Georgia*, 442 U.S. 99 (1979); *Beck v. Alabama*, 477 U.S. 625 (1980); *Bullington v. Missouri*, 451 U.S. 430 (1981); *Eddings*, 455 U.S. at 110-16.

There was a prevailing local professional standard in this case which was clearly disregarded by counsel, rendering their performance deficient.[34] It was a standard

[34] Also, counsel's performance in this case fell below nationwide standards of professional competent capital counsel, as evidenced by the ABA standards of competence. *See supra* note 33. Moreover, counsel did not present a mitigating case because counsel made the decision to re-try guilt in the mitigation phase *before* any evidence was even presented in the guilt/innocence trial. JA 485-486. Counsel's decision

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practice in the Maryland Public Defenders' Office to prepare social histories of capital defendants, and funds were provided specifically for an expert to prepare a social history. Although counsel was aware of these professional norms, they simply disregarded them. Counsel's performance was lacking because they did not comply with this prevailing professional norm by failing to engage an expert to prepare a social history of Wiggins.[35] *See also Burger*, 483 U.S. at 811-12 (Blackmun, J., dissenting) ("It is also important to 'keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.'").

B. Defendant Suffered Prejudice In This Case Because Counsel Failed to Investigate The Existence of Mitigating Evidence

The purpose of mitigating evidence is to allow for individualized sentencing. However, the defendant is deprived of the right to individualized sentencing when his

was therefore never reasonably informed and cannot be considered tactical.

[35] No argument can be made that the prosecution's death penalty aggravation case was "adversarially tested" in this case. Rather, the case for guilt was re-tested in the *sentencing* trial, despite the fact the jury was repeatedly instructed that the defendant was already found guilty and they were to take the finding as dispositive on the issue. JA 53, 362. ("This conviction is binding upon you. Even if you believe the conviction to have been in error, you must accept that fact."). The State cannot claim that the aggravation case presented was in any way rebutted or "tested" by the re-argument over guilt, considering the trial court's instruction to the jury. Due to the instruction, the only possible way to subject the prosecution's aggravation case to "adversarial testing" was to present a mitigating case.

own counsel fails to investigate what it is that makes him an individual. *See Williams*, 529 U.S. at 393 ("[I]t is undisputed that Williams had a right – indeed, a constitutionally protected right – to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer."). Thus, the failure to investigate mitigating evidence deprives the defendant of the right to effective counsel. *See, e.g., id.*; *Strickland*, 466 U.S. at 694 ("An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be lower."). In this case, counsel's failure to investigate, obtain, or present any mitigating evidence – let alone the powerful, concrete, and specific mitigating evidence that was available – prevented the jurors from hearing any humanizing information about Wiggins.[36] Hence, there is a reasonable probability that if the jury had learned of Wiggins' lack of a prior criminal record,[37] borderline mental retardation,

[36] *See Brownlee*, 306 F.3d at 1074 (granting habeas relief, finding that the defendant had been prejudiced when his counsel failed to investigate and present mitigating evidence).

[37] Wiggins' background could not have aggravated the threat that he would be dangerous in the future, and in any event the crime he was convicted of was not more heinous than the one committed in *Williams*, 529 U.S. at 367-69. Other courts have found prejudice for failing to investigate mitigating evidence on facts that were similar or less favorable than the facts of this case. *See Lockett*, 230 F.3d at 710-15 (finding prejudice even though the jury could have concluded that the defendant's "mental problems aggravated the threat of future dangerousness," and despite "the undeniable gravity, cruelty and deliberateness of the crimes that [defendant] committed: a calculated double-murder – involving an ambush, multiple shootings, kidnapping and execution – of an innocent couple."); *Silva*, 279 F.3d at 847-50; *Coleman*, 268 F.3d at 452-53; *Jermyn*, 266 F.3d at 309-12; *Battenfield v. Gibson*,

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and the abuse he suffered as a child that the outcome would have been different.[38]

1. Wiggins suffered prejudice because there is a reasonable probability that at least one hypothetical juror could have found the mitigating evidence not presented persuasive and voted to spare Wiggins' life

When seen through the prism of jurors as individual moral deliberators, *Strickland*'s "reasonable probability" test tolerates *less error* during death penalty sentencing than during the guilt phase of the trial.[39] The capital

236 F.3d 1215, 1235 (10th Cir. 2001); *Kenley v. Armontrout*, 937 F.2d 1298, 1308-09 (8th Cir. 1991); *Brewer*, 935 F.2d at 858-59.

[38] *See Williams*, 529 U.S. at 391-99 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."); *Penry*, 492 U.S. at 328 (in capital cases, the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.") (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion)); *see also Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997); *Loyd v. Whitley*, 977 F.2d 149, 160 (5th Cir. 1992); *Armstrong v. Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1987).

[39] When deciding whether to apply the death penalty to a particular defendant, the jury must provide a "reasoned *moral* response." *Penry*, 492 U.S. at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original)). The "reasoned moral response" weighs the particularized evidence of a defendant's moral culpability against the twin social purposes served by capital punishment: retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 183 (1976). The severity of the appropriate punishment necessarily depends on the "personal responsibility and *moral* guilt" of the particular defendant. *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (emphasis added). The jury must treat the defendant as a "'uniquely individual

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sentencing process depends upon the jurors' moral values and judgment, and each juror's own moral belief operates as the independent standard by which the evidence is *weighed* and compared to the mitigating and aggravating factors.[40] *See Jurek v. Texas*, 428 U.S. 262, 272-73 (1976) (plurality opinion). Given the diversity of opinion in the United States on when, and under what circumstances, the death penalty is a proportionate penalty,[41] it follows

human bein[g].'" *Penry*, 492 U.S. at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

[40] *See* MD. CODE ANN., ART. 27 § 413 (listing various mitigating circumstances the jury may consider and stating "a decision to impose a death sentence must be unanimous"). Courts cannot bar jurors who harbor some moral reservations about the appropriateness of the death penalty. Subject to one well-established exception, this Court has yet to permit morally defined restrictions on who may sit as a juror in a capital case. Only jurors with categorical moral dispositions toward the application of the death penalty may be struck for cause. *See Morgan v. Illinois*, 504 U.S. 719, 729 (1992) (holding that jurors who would apply the death penalty regardless of any mitigating evidence may be struck for cause); *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (holding that jurors who would categorically refuse to apply the death penalty may be struck for cause). Thus, a juror may be struck for cause, not simply on the basis of the juror's moral beliefs, but on the juror's expressed and specific intent to ignore the evidence presented at the sentencing phase. *Witt*, 469 U.S. at 424.

[41] Public opinion shows that potential jurors support the imposition of the death penalty in only narrow circumstances not present in this case. According to the 2002 year end report issued by the Death Penalty Information Center, public opinion remains divided on whether the death penalty or a sentence of life without the possibility of parole is the most appropriate sentence for first degree murder. Richard C. Dieter, *The Death Penalty In 2002: Year End Report*, Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/yrendrpt02.pdf (last visited Jan. 6, 2002). A May 7, 2002 ABC News poll found that 65% of Americans support the death penalty when no alternative is offered. ABC News, May 7, 2002, *available at* http://abcnews.go.com/sections/us/DailyNews/deathpenalty_poll020507.

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that there is normally a reasonable probability that at least one of the twelve jurors had some moral reservations about the application of the death penalty in this case.[42]

html (last visited Jan. 6, 2002). When given the sentencing option of life without the possibility of parole, 46% of Americans support the death penalty. *Id.* Support for the death penalty has declined since the early 1990's, and despite the recent terrorist attacks. According to a recent Gallup poll, in general, 72% of Americans favor the death penalty for defendants convicted of murder and 25% oppose it. Gallup News Service, May 20, 2002, *available at* http://www.gallup.com/poll/topics/ (last visited May 20, 2002). Fifty-three percent of Americans believe the death penalty is applied fairly, while 40% say it is applied unfairly. *Id.* Eighty-two percent oppose the death penalty for the mentally retarded, 73% oppose the death penalty for those who are mentally ill, and 69% oppose capital punishment for juvenile offenders. *Id.*

This reduced public support for the death penalty appears to be playing out in courtrooms across the country. According to the U.S. Department of Justice, the total number of death penalty sentences in 2001 was 155, the lowest number of death sentences since 1979. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, PUB. NO. 197020, CAPITAL PUNISHMENT 2001, 9-13 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cp01.pdf. The total number of death sentences in 2001 was also down significantly from the average of 296 death sentences per year between 1994 and 2000. *Id.*

[42] *Cf. Atkins v. Virginia*, 122 S.Ct. 2242, 2247 (2002) (noting that whether a punishment is "excessive" is judged by the standards "that currently prevail"). Most states commit capital sentencing decisions to juries, *see Ring v. Arizona*, 122 S.Ct. 2428, 2442 n.6 (2002), and those states require unanimity, so that a single juror can preclude a death sentence. *See, e.g.*, MD. CODE ANN., ART. 27 § 413; 720 ILL. COMP. STAT. ANN. 5/9-1 (West 2002); N.Y. CRIMINAL PROCEDURE LAW § 400.27 (McKinney 2001); 42 PA. CONS. STAT. § 9711 (1998); *see also Atkins*, 122 S.Ct. at 2247 ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'") (citation omitted). Therefore, based on the state's statutes, the question should focus on the probability of the mitigating evidence to sway a *single* juror.

In applying the *Strickland* test, the court cannot average all jurors into one "reasonable juror," as it would in cases involving error during the guilt phase of the trial. *See Ring*, 122 S.Ct. 2442-43 ("'The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which the law should be enforced and justice administered.'") (quoting *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)). In the guilt phase, the law presumes uniform application of the universal rules of logic and inference by different jurors.[43] By contrast, in the penalty phase, even though moral rules are often presumed to have universal applicability, there is no requirement of acceptance of a particular set of moral rules.[44] Thus, there is a reason, based on law and fact, to presume that the jurors did not all share a common or universal set of moral precepts and values.[45]

Therefore, in cases involving ineffective assistance of counsel at the death penalty sentencing phase, the prejudice test under *Strickland* must focus on the reasonable probability that counsel's unprofessional errors and the omitted mitigating evidence would have affected *one* hypothetical juror with some moral reservations about the

[43] Not only are there no principled reasons to differentiate among the jurors based upon their intellectual capacities, but courts do not hypothesize differences among jurors. *See, e.g., Penry*, 532 U.S. at 804.

[44] *See supra* notes 39-43.

[45] The reasoning of this Court's decisions in *Ring* and *Penry* combined with the unanimity requirement imposed by the states, *see supra* note 42, demands that each *juror* provide an *individualized* "reasoned moral response" based upon the evidence adduced at sentencing.

application of the death penalty.[46] *See, e.g., Emerson*, 91 F.3d at 907 (stating that the defendant "need[ed] to convince only one of twelve jurors to refuse to go along with a death sentence" and that the unused mitigation report likely would "reduce [petitioner's] moral responsibility for the murder . . . to a level at which capital punishment would strike that juror as excessive or one or more of the jurors would think [petitioner] deserving of mercy.").

2. The mitigation evidence not presented could, in all probability, have spared Wiggins' life

Compelling mitigation evidence existed in this case, which in all probability, if presented to the jury, could have spared Wiggins' life.[47] More importantly, the omitted evidence comported with and supported the argument that Wiggins lacked sufficient culpability for the crime to impose the death penalty. Wiggins is "borderline intelligent" with

[46] *See supra* note 41 on public opinion regarding imposition of the death penalty.

[47] Further compounding the error is the fact counsel failed to conduct an investigation for mitigating evidence despite the fact that it is "a routine practice in the Maryland Public Defender's Office," and that funds were available to hire an expert to prepare a social history of Wiggins. JA 472-78, 485-88, 514-15, 539-40; *see also Wiggins*, 164 F. Supp. 2d at 559-60; *supra* Part II.A.3 (discussing prevailing professional standards).

an IQ of 72 and possibly mentally retarded.[48] An examination of Wiggins at age 18 revealed cranial pathology and possible head trauma and indicated mental retardation.[49] Wiggins had no prior criminal record.[50] Wiggins suffered through a horrific, abusive childhood.[51] As a child, he was frequently left alone for days at a time and was forced to beg or eat refuse.[52] He was beaten, and even burned on one occasion by his mother.[53] The abuse caused Wiggins to be placed in foster care when he was six.[54] However, he suffered even more abuse in foster care, being beaten and repeatedly sexually molested and raped.[55] This significant mitigating evidence, if presented, had a reasonable probability to change the outcome of the proceeding.[56] Together this mitigating evidence makes a convincing case for sparing Wiggins' life, and this omitted evidence, if presented, had the reasonable probability of persuading at

[48] JA 437-39. Although it is not known if Petitioner is legally mentally retarded, Maryland does not execute the mentally retarded and did not do so at the time of Wiggins' trial, *see* MD. CODE ANN., ART. 27 § 412, and reduced mental capacity is a mitigating factor, *see* MD. CODE ANN., ART. 27 § 413.

[49] JA 435-447.

[50] JA 17-24. The lack of a prior criminal record has bearing on the question of whether Wiggins posed a future danger to society. *Wiggins*, 164 F. Supp. 2d at 559-60.

[51] JA 425-444.

[52] JA 428-430.

[53] JA 429-431.

[54] JA 431-432.

[55] JA 432-444.

[56] *See supra* note 41 (restating numbers from recent polls of Americans on death penalty issue).

least one member of the jury that death was not the proper sentence in this case.

CONCLUSION

The Maryland court's decision was an unreasonable application of *Strickland*, as the failure to perform a sufficient investigation for mitigating evidence before making a decision to forgo additional investigation or not to introduce any mitigating evidence is not a tactical decision. Wiggins suffered prejudice in this case because the evidence counsel failed to investigate and present was compelling and, in all probability, if presented to the jury, could have spared Wiggins' life. This Court should therefore find the Maryland Court of Appeals unreasonably applied *Strickland* and reverse the Fourth Circuit's ruling.

Respectfully submitted,

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No. 02-311

In The
SUPREME COURT OF THE UNITED STATES

KEVIN WIGGINS,
Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MARYLAND CRIMINAL DEFENSE ATTORNEYS' ASSOCIATION AND THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit

[1] Pursuant to Rule 37.3, the parties have consented to the submission of this brief. Letters of consent have been filed with the Clerk. No party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. Rule 37.6.

organization founded in 1958 to improve the representation of the accused and to advocate the protection of constitutional rights in criminal cases. Through its state and local affiliates, NACDL represents more than 28,000 lawyers nationwide.

The National Legal Aid and Defender Association (NLADA) is a District of Columbia non-profit organization founded in 1911. NLADA's purpose is to promote the availability of legal services to individuals who are unable to afford counsel. NLADA's membership includes public defender programs, statewide defender commissions, assigned counsel programs, death penalty trial and post-conviction programs and law school criminal clinics across the nation. In 1988 NLADA developed standards for representation in capital cases that were subsequently adopted by the American Bar Association, including NLADA Standard 11.4.1 (requiring thorough investigation in preparation for both the guilt and penalty phases).

Because their members represent clients in serious criminal prosecutions, including capital cases, across the country, NACDL and NLADA have an interest in preventing the erosion of legal rules designed to assure fair adversary proceedings and trustworthy outcomes in those cases. Counsel's role in a capital sentencing hearing "is comparable to counsel's role at trial – to ensure that the adversarial testing process works to produce a just result under the standards governing decision." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The requirement at issue in this case, that defense counsel must base decisions in capital sentencing hearings as well as trials on a reasonable investigation, is a fundamental aspect of the Sixth Amendment right to the assistance of counsel and an important safeguard against unconstitutional death sentences. The experience of their members in capital trials also gives NACDL and NLADA a unique perspective on the reasonableness of the "tactical"

justification offered in this case for defense counsel's failure to conduct a reasonable investigation of Petitioner's background, depriving the sentencing jury of essential information about the justice of the sentence it was being asked to impose.

The Maryland Criminal Defense Attorneys' Association (MCDAA) is the Maryland affiliate of NACDL. MCDAA was formed to promote study and research in the field of criminal defense law and related areas; to disseminate knowledge by lecture, seminars and publications; to promote the proper administration of justice; to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases. MCDAA has a significant interest in the quality of representation provided to the accused in capital cases in the State of Maryland. In addition, MCDAA is concerned that rulings by the United States Court of Appeals for the Fourth Circuit such as the decision below have tolerated representation in capital cases beneath any reasonable professional standard. This case is important to MCDAA because it offers the opportunity to reestablish *Strickland* as the benchmark for capital cases reviewed in the Fourth Circuit.

STATEMENT

It was clearly established at the time of Kevin Wiggins' trial that each juror in Maryland was entitled to consider "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." See *Mills v. Maryland*, 486 U.S. 367 (1988) (unconstitutional to require unanimous agreement on mitigating circumstances). Also clearly established was defense counsel's duty to investigate the client's background for potentially mitigating information to present at sentencing. See JA 552-53; 563-64;

566-68; 573-74 (testimony of defense expert in post-conviction hearing); Report of the Governor's Commission on the Death Penalty: An Analysis of Capital Punishment in Maryland: 1978 to 1993, 74-75 (1993)[2]; American Bar Association, Standards for Criminal Justice: The Defense Function, 4-4.1, commentary at 4-55 (2d ed. 1980); American Bar Association, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guidelines 11.4.1(D)(2), 11.8.3, 11.8.6 (Feb. 1989). Practice in Maryland conformed to those standards. The district court found that Wiggins' counsel knew "it was a routine practice in the Maryland Public Defender's Office to retain an expert forensic worker to prepare a social history of capital defendants and that funds were available for that purpose." (Pet. App. 53a). The state court judge who held the hearing on Wiggins' motion for post-conviction relief had "never seen a case where there was not a social history prepared. This is the first one." (4/7/94 Tr. 55).

Under Maryland law, a jury's sentencing verdict of death in a capital case must be unanimous. If the jury does not agree, a life sentence is imposed. Md. Code Ann., Art. 27, § 413(k)(2). Based on information in a cursory state presentence investigation report, (JA 17-24; Pet. App. 135-36a), one or more members of Wiggins' sentencing jury found mitigation in his "background." (JA 409). The parties also stipulated to a statutory mitigating factor in the absence of a conviction for a crime of violence. (JA 367). The jury nevertheless sentenced him to death, concluding that the aggravating circumstance that the murder was in the course of

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[2] This document is available at http://www.prattlib.md.us/edocs/ocm29425415/ocm29425415.html.

a robbery outweighed the mitigating information. (JA 409-10).

As the district court found, there was much more about Kevin Wiggins' background the sentencing jury did not know. (Pet. App. 53-55a). Wiggins had been identified since childhood as borderline mentally retarded, with an IQ of 72. After his alcoholic mother physically abused and then abandoned him at age 6, he was placed in foster homes where he was physically and sexually abused. (Pet. App. 163-198a). A fuller account of Wiggins' life would have amplified the mitigating impact of a life history that at least one member of the sentencing jury found mitigating in its most perfunctory form. It would also have diminished the misleading impact the presentence report may have had on other members of the jury. Had the jury known Wiggins' full story, it would undoubtedly have interpreted differently Wiggins' capsule description of his background in the presentence report as "disgusting." The jury would have understood the reasons for the discrepancy between his account of foster care and his sister's account of a "nice home with a roof over our heads." Had the jury known about Wiggins' limited intelligence, it would have been more understanding of other aspects of the presentence report, such as his becoming "lost" in school before dropping out. The jury would also have been more favorably impressed with his employment history and his efforts to support himself despite his limited skills.

Despite the "routine practice" of the Maryland Public Defender's Office, and despite his lawyers' possession of social service records about Wiggins' upbringing, his lawyers did not prepare a history about him. Although the social service records provided enough information to demonstrate that further investigation would be fruitful, they omitted crucial facts, such as the physical and sexual abuse Wiggins suffered in foster care. See Pet. App. 54a, n.16 (finding by

district court that the Maryland Court of Appeals' decision affirming the denial of state post-conviction relief was based on misunderstanding about contents of social service records); Pet. App. 142a, n.269 (finding by state post-conviction judge that social service records did not contain reports of sexual abuse). Wiggins' lawyers did not look any further. Their defense in the penalty phase challenged whether Wiggins was eligible for a death sentence as a "principal" in the murder for which he had been convicted. The defense did not show that Wiggins had been an accomplice to a murder committed by others, however. *Wiggins v. State,* 324 Md. 551, 571-72 (1991). Instead, defense counsel sought to "retry" the guilt phase, knowing the jury would be instructed that it was bound by the earlier guilty verdict. (Pet. App. 51a; JA 485-86).

The district judge rejected the State's "tactical" justification for counsel's failure to perform a routine investigation:

> In fact, it appears that defense counsels' "tactical decision" was forced on them by inattention and lack of preparation. Before the trial, lead counsel had taken a new full-time job in another county, spent only "a day a week or so" attending to his former responsibilities, and left it to his co-counsel to do "most of the work." Here, the attorney left in charge had previously worked on one or two felony jury trials, had never before worked on a capital trial, and was "frankly overwhelmed" as the trial date approached.
> (Pet. App. 52a) (citation omitted).

Based on those findings, the district court ruled that Kevin Wiggins had been denied effective assistance of counsel in

his sentencing (Pet. App. 55a), and granted relief from his death sentence (Pet. App. 90-91a).[1]

The United States Court of Appeals for the Fourth Circuit reversed in three opinions. Judge Widener's opinion accepted as reasonable the judgment that "avoidance of conflicting arguments supported limited investigation into social history." (Pet. App. 23a). Thus, defense counsel's belief that he could successfully attack the evidence that Wiggins was eligible for a death sentence as a "principal" under Maryland law excused his failure to investigate mitigating information he knew or should have known existed in Wiggins' history. Chief Judge Wilkinson concurred, expressing a lack of certainty as to Wiggins' guilt, but concluding that while reservations about "the lack of total certitude" should be a consideration in granting executive clemency, they did not undermine the judgment for purposes of relief under 28 U.S.C. § 2254. Judge Niemeyer also concurred, describing his decision concerning ineffective assistance as "a closer call," than the decision as to whether the evidence was sufficient to convict. (Pet. App. 25a). Acknowledging that his colleagues were satisfied with the reasonableness of the decision not to investigate on tactical grounds, Judge Niemeyer explained his reservations:

> It appears to me, however, that counsel could have had it both ways. He could have insisted on arguing liability and still have maintained

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[1] The district court also granted relief from the judgment of conviction, concluding that the Maryland Court of Appeals had unreasonably applied the constitutional standard for sufficiency of the evidence. (Pet. App. 42-55a). The Fourth Circuit overturned that ruling as well. (Pet. App. 12-17a). This Court's grant of certiorari was limited to the second question presented in Wiggins' petition, relating to the ineffective assistance of counsel at sentencing.

> that any sentence of death would be inconsistent with the mitigating circumstances of Wiggins' miserable upbringing and marginal intelligence. *Id.* 25-26a.

Nevertheless, he concluded there was "support in the record to conclude that Wiggins' counsel's decision was a tactical one and that it was not an unreasonable strategy to pursue." *Id.* 26a. On that basis, he concurred in holding that the Maryland Court of Appeals did not unreasonably apply the *Strickland* standard. *Id.*

SUMMARY OF THE ARGUMENT

All of the safeguards imposed to prevent the arbitrary infliction of the death penalty depend on "the adversarial testing process." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The diligence and vigor of defense counsel determine whether facts that may show the defendant's innocence are uncovered, and whether the legal rules that channel sentencing discretion are fairly applied. But there is no safeguard more dependent upon defense counsel's faithful discharge of his office than the requirement that "punishment should be directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 327 (1989). It is up to the lawyer for the accused to expose the "compassionate or mitigating factors stemming from the diverse frailties of humankind." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Unless that occurs, a death sentence is not a "reasoned moral response" to the offense and the offender. *Penry v. Johnson*, 532 U.S. 782, 121 S.Ct. 1910, 1920 (2001).

Decades of experience have shown that "in the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a reasonably substantial,

independent investigation into potential mitigating circumstances." *Neal v. Puckett*, 286 F.3d 230, 236-37 (5th Cir. 2002) (en banc). Without such an investigation, facts that are crucial to understanding and to judging the blameworthiness of the offender will remain hidden. See, e.g., *Williams v. Taylor*, 529 U.S. at 398-99; *id.* at 415-16 (O'Connor, J., concurring). While there is room for professional judgment about what information to present to the jury and how to present it most effectively, a broad investigation of the defendant's life is a precondition of those professional judgments. Otherwise, counsel's failure to investigate becomes the wild card that trumps the jury's ability to render and the judiciary's ability to ensure death sentences that are morally defensible within the framework of this Court's precedents.

Kevin Wiggins' lawyers failed in their duty to investigate his background and deprived the sentencing jury of the information it needed to apply the law fairly to the crime of which he was convicted. The "tactical" justification for their dereliction accepted by the court below is an unreasonable application of this Court's holding in *Strickland* for three related reasons. *First*, as a general matter, it is not reasonable to decide not to investigate mitigating background information just because the defense lawyer plans to contest some aspect of the defendant's guilt in the sentencing phase. The decision below increases the risk of erroneous death sentences in those cases in which the risk of erroneous conviction is greatest. *Second*, in this case it was not reasonable to make a tactical judgment for the purpose of avoiding "conflicting arguments" without investigating to determine whether there was a conflict. Had Wiggins' lawyers investigated, they would have realized there was none. *Third*, it was not reasonable to "retry guilt" in the sentencing phase instead of presenting the readily discoverable mitigating information about Wiggins'

deplorable upbringing. An investigation would have produced far more compelling reasons to spare Kevin Wiggins' life than the quixotic attempt to persuade the sentencing jury to disregard the fact of his conviction in defiance of jury instructions that the defense conceded the jury had to follow.

ARGUMENT

THE FAILURE TO INVESTIGATE WIGGINS' BACKGROUND WAS UNREASONABLE AND INCOMPATIBLE WITH THE DUTIES OF COUNSEL IN A CAPITAL CASE

Kevin Wiggins' lawyers unreasonably decided not to present mitigating information about his background without conducting an adequate investigation to gather the facts. As in *Williams v. Taylor*, 529 U.S. 362 (2000), "the graphic description of [Wiggins'] childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability." 529 U.S. at 398. Had they done a reasonable investigation, Wiggins' lawyers would have discovered facts that could have had a tremendous impact on the sentencing jury, without foreclosing a challenge to the "principal" requirement. Their failure to investigate is not excused as a tactical decision because they could not know whether Wiggins' background would support or conflict with their planned defense or weigh the tactical alternatives without investigation.

The basic ethical duty of a lawyer in a capital case thoroughly to investigate his client's background was articulated in professional standards,[4] training manuals

[4] See, e.g., American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases,

Footnote cont'd

developed to aid lawyers in capital cases,[5] and caselaw[6] at the time of Kevin Wiggins' trial. A Subcommittee of the Defender Services Committee of the Judicial Conference recently summarized the responsibilities of a defense lawyer in a capital case in this way:

> In addition to defending against the prosecution's case for a death sentence, counsel must present a case for a lesser sentence. In order to effectuate the defendant's constitutional right to present any information in mitigation of sentence, counsel must conduct a broad investigation of the defendant's life history. "Although it makes no express demands on counsel, the [right to offer mitigating evidence] does nothing to fulfill its purpose unless it is understood to

Footnote cont'd

Guideline 11.4.1(C), *available at* http://www.nacdl.org/DEATH/guidelines.pdf.

[5] See, e.g., 3 Anthony Amsterdam, Trial Manual 5 for the Defense of Criminal Cases ¶ 468-A at 307 (1989).

[6] See, e.g., *Blake v. Kemp*, 758 F.2d 523, 534 (11th Cir. 1985). It is possible, however, that language in the Maryland Court of Appeals' decision in *State v. Tichnell*, 306 Md. 428, 453-56 (1986), may have misled counsel to believe that the duty to investigate the defendant's background was limited to evidence that would establish the statutory mitigating circumstance of "substantial impairment," rather than the full range of evidence contemplated by this Court's precedents. That legal error would not make counsel's failure reasonable. See *Williams v. Taylor*, 529 U.S. at 395 (counsel's legal error regarding admissibility of mitigating evidence was not a valid basis for failing to investigate). Moreover, investigation of Wiggins' background was plainly important to developing mitigation based on substantial impairment.

presuppose the defense lawyer will unearth, develop, present and insist on consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" Indeed, one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information. The broad range of information that may be relevant to the penalty phase requires defense counsel to cast a wide net in the investigation of any capital case. Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Representation, p.6 (May 1998) (footnotes omitted).[7]

Wiggins' lawyers did not fulfill their duty. They obtained official records of his time in foster care. Those records revealed enough about the treatment Kevin Wiggins received at the hands of a succession of adults responsible for his care that no lawyer could have failed to recognize their potential to persuade a jury to spare his life. The records also showed evidence of borderline mental retardation in early childhood. Maryland law enacted shortly before Wiggins' trial barred imposition of the death penalty on the mentally retarded. Md. Code. Ann. Art. 27, § 412(f)(1) (1989). That is strong evidence that a Maryland jury would have considered even borderline intelligence as mitigation of the offense.

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7 This document is available at http://www.uscourts.gov/dpenalty/4REPORT.htm. Although the report involves the costs of representation in federal death penalty cases, its description of the function of defense counsel is based on and extends to state death penalty cases. *Id.*

With the records as a starting point, a competent lawyer would have gathered additional records, interviewed witnesses who could add to Wiggins' life history, and identified experts who could help explain Wiggins' background to the sentencer. ABA Guideline 11.4.1(D). Had they done so, Wiggins' lawyers could have presented reasons to spare his life that were even more compelling than the case presented in the state post-conviction proceedings, because it would have been even easier to locate witnesses who could bring Kevin Wiggins' upbringing to life than it was years later when post-conviction counsel began the search. Instead, they allowed the superficial and misleading description of Wiggins' life history in the state presentence investigation report to guide the jury's "reasoned moral response" to the crime.

A. A Strong Defense to Guilt Does Not Excuse Failure to Investigate Mitigating Information.

The Fourth Circuit below accepted the argument that Wiggins' lawyers were reasonable in failing to investigate his background because of their decision to challenge his eligibility for a death sentence as a principal under Maryland law. The court upheld a "tactical" choice made in ignorance solely because it avoided potentially "conflicting arguments," about guilt. The Fourth Circuit's decision amounts to a per se rule that a lawyer is not required to investigate mitigating information in the defendant's background in a case in which the lawyer plans to contest aspects of the defendant's guilt in the sentencing phase. This leads to the unacceptable result that a sentencing judge or jury will be given less reason to spare the life of a defendant for whom there remains doubt about guilt, than for a defendant whose guilt is unquestioned. While there may be situations in which an experienced trial lawyer might choose, after consulting with the client, to limit

the defense presentation in the penalty phase to contesting an aspect of the offense that is a requirement for death eligibility or an aggravating circumstance, these decisions must be based on a full investigation of the facts, rather than on a preconception that no background information, no matter how potent, would be worth presenting in combination with or instead of a challenge to aspects of the offense.

Affirmance of the Fourth Circuit's decision would undermine the *Strickland* standard in cases where there is doubt about guilt and would create a potentially vast loophole in the body of this Court's precedents assuring that sentencers in capital cases consider relevant mitigating evidence. See, *e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986). A lawyer's failure to investigate, no less than barriers to the consideration of mitigating evidence imposed by statute, or by the sentencing court, or by an evidentiary ruling, "risks erroneous imposition of the death sentence." *Mills v. Maryland*, 486 U.S. at 366 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 117 n.)(O'Connor, J., concurring)). It would be tragic to increase the risk of erroneous death sentences in cases in which there is also a risk of an erroneous conviction.

Virtually every capital sentencing scheme offers some opportunity to relitigate guilt or innocence in the penalty phase. In Maryland, this can take the form of a challenge to death-eligibility as a principal, as Wiggins' lawyers chose to do. But even if that were not the case, the defense could have contested the aggravating circumstance that the murder was in the course of a robbery, as the gist of Wiggins' defense in both phases of the trial was that the victim died a day after he came into possession of her property. In other states and under federal law, there are other offense-based aggravating circumstances that the jury must find in the penalty phase,

and other statutory and non-statutory requirements for death eligibility, such as the determination of personal responsibility for the murder required under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987). A stated decision to "retry guilt" (Pet. App. 51a), cannot excuse a failure to explore mitigating evidence in the defendant's background when – as in this case – there is no "reason to believe that pursuing [such an investigation] would be fruitless or even harmful." *Strickland*, 466 U.S. at 691.

Even worse, the Fourth Circuit's reasoning would also excuse a lawyer from investigating the defendant's background in a case in which guilt is hotly contested and the same jury hears the guilt and penalty phases. By the logic of the decision below, a lawyer who hoped to avoid a death sentence based on lingering doubt about guilt could invoke that tactical choice as a reason not to investigate background information that would dilute the jury's focus on guilt or innocence.

"Judicial scrutiny of counsel's performance must be highly deferential," *Strickland*, 466 U.S. at 689, but only when it is within professional norms. There can be no question here, however, that the decision not to investigate Wiggins' background was outside the "wide range of reasonable professional assistance." *Id.* The state court judge who held the post-conviction hearing immediately recognized that counsel's conduct was far outside the norms of practice in capital cases. (4/7/94 Tr. 66). Although he later concluded in his written opinion that Wiggins was not entitled to relief, that decision was based on the same blanket acceptance of counsel's asserted trial tactics that underlies the Fourth Circuit's ruling. See Pet. App. 155a ("Numerous cases state emphatically that when . . . the decision not to investigate, etc., is a matter of trial tactics, there is no ineffective assistance of counsel."). To the contrary, "strategic choices

made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691. Wiggins' lawyers had the time and the resources to investigate his background without short-changing other aspects of the defense. Nothing in the Fourth Circuit's decision identifies a "reasonable professional judgment" justifying counsel's failure to investigate in this case.

B. The Mitigating Evidence of Petitioner's Background Was Not Incompatible With a Challenge to Death Eligibility as a Principal.

The Maryland Court of Appeals' decision upholding Wiggins' sentence was an unreasonable application of *Strickland* because it never explained how fully investigating Wiggins' background would have undermined the sentencing phase defense counsel chose; why that choice was reasonable without conducting a routine investigation into the alternatives;[1] and how the evidence about Wiggins' background would have hurt the attack on his death-eligibility as a principal. See Pet. App. 126a. The Maryland Court of Appeals ruled that Wiggins' lawyers could dismiss his life history as a "distraction" from the defense that he was not a principal, *id.*, but they could not have done so under *Strickland* without knowing what his history was and

[1] In part, the Maryland Court of Appeals decision was based on a misunderstanding of the facts. As the district court found, the Department of Social Services records did not document abuse, as the Court of Appeals believed. The district court's finding was not disputed on appeal and is not clearly erroneous. See *Amadeo v. Zant*, 486 U.S. 214, 223-225 (1988) (district court's factual finding that counsel failed to challenge racial discrimination in the jury because of concealment by local authorities rather than for tactical reasons was binding).

assessing its potential value as mitigation. Beyond this, the Maryland Court of Appeals observed that, "the dysfunctional and abused childhood defense is not always successful." *Id.* But that generality proves nothing about what was reasonable for Kevin Wiggins' lawyer to do *in this case*. Surely *Strickland* does not allow a lawyer to omit a routine investigation because the defense evidence it might yield is not "*always* successful."

The premise of counsel's explanation for foregoing a routine investigation of Kevin Wiggins' background was that the presentation of this information, no matter what the investigation revealed, would be incompatible with his predetermined decision to contest Wiggins' responsibility as a principal in the homicide. That explanation is plausible only if any mitigating information in Wiggins' background would *necessarily* implicate him as a principal.[2] As the district court found, however, "mitigating information of Wiggins' vulnerability and limited intelligence would not have been strategically inconsistent with 'retrying guilt' during the sentencing phase. Indeed, it would seem that skillful counsel would have been able to mesh these facts into an effective

[2] By contrast, in *Burger v. Kemp*, 483 U.S. 776, 793 (1987), the lawyer conducted a much more extensive investigation of Burger's background than Wiggins' lawyers did. Burger's attorney made an informed decision not to present the information he had obtained, fearing that cross-examination "might be literally fatal." Even the new information obtained by post-conviction lawyers was "by no means uniformly helpful to [Burger] because they suggest violent tendencies that are at odds with the defense's strategy" of attributing the crime to the co-defendant's influence. *Id.* See also *Darden v. Wainwright*, 477 U.S. 168 (1986) (defense presentation of mitigating information would have opened the door to damaging rebuttal); *Bell v. Cone*, 122 S.Ct. 1843 (2002) (defense counsel made strategic decision to rely on mitigating evidence presented in the guilt phase and to waive closing argument to avoid harmful cross-examination and rebuttal argument).

argument that Wiggins had been made the pawn of others who were responsible for the murder." (Pet. App. 55a, n.17); see also 4/7/94 Tr. 72 (state post-conviction judge notes that mitigating evidence was not incompatible with "double dip" strategy). The facts counsel would have uncovered through a routine investigation demonstrated that Wiggins was readily susceptible to manipulation and exploitation by others, just as he had been sexually exploited and pledged to silence by a foster father and Job Corps worker. This would have bolstered, not weakened, an argument that Wiggins had acquired the proceeds of robbery and murder that had been committed by someone else. The district judge concluded that "this hypothesis is not wholly conjectural or entirely implausible," based on the following evidence:

> One of the brothers of Wiggins' girlfriend, Geraldine Armstrong, had an apartment directly under the apartment of Ms. Lacs. Further, the trial testimony disclosed that another of Armstrong's brothers was involved in an angry confrontation with Armstrong and Wiggins on the evening of Thursday, September 15. It may be that if the robbery and murder occurred late in the afternoon or early in the evening of that day, one or both of the brothers may have been involved. Or it may be that Wiggins (who the record reflects was borderline mentally retarded) pilfered Ms. Lacs's keys and credit cards on Thursday afternoon, and that one or both of the brothers later returned to her apartment with the keys (borrowed or taken from Wiggins) and, in the course of looking for more loot, committed the murder. (Pet. App. 44a, n.9).

Wiggins' counsel offered no specific reason why the information gleaned from his background was incompatible with his chosen strategy of retrying guilt. [10]

Judge Niemeyer saw that "counsel could have had it both ways. He could have insisted on arguing liability and still have maintained that any sentence of death would be inconsistent with Wiggins' miserable upbringing and marginal intelligence." (Pet. App. 25a). Moreover, as the district court explained, "[t]he absence of a criminal record presumably would have dispelled any fear that counsel would have had that presentation about Wiggins' background would have been detrimental to him in terms of 'future dangerousness.'" (Pet App. 55a, n. 17). For the same reason, there was little risk that exposing the jury to Wiggins' unfortunate background would have undercut a lingering doubt argument by suggesting a propensity to commit a crime like the homicide charged. Certainly Wiggins' lawyers could not dismiss the potential value of mitigating evidence drawn from their client's life sight unseen.

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[10] The testimony in the post-conviction hearing that counsel failed to investigate Wiggins' background because of a tactical decision to retry guilt is contradicted by the record. Wiggins' lawyers did not plan to rely exclusively on their challenge to his responsibility as a principal in the penalty phase. Beforehand they requested a bifurcated sentencing hearing, so that they could address the principal issue first, before turning to "aspects of his life history, including a diagnosis of personality disorder, including a diagnosis of some retardation," that were not relevant to liability as a principal. (JA 34-52). Even after the judge denied a bifurcated hearing, counsel told the jury in opening that Wiggins "has had a difficult life," but had still been a productive member of society with no prior convictions. (JA 72). They also called an expert to testify concerning Wiggins' potential adjustment in prison if sentenced to life imprisonment rather than death. (JA 306-40). The defense also proffered the testimony of a psychologist that Wiggins was "childlike" and ineffectual, with a low IQ, but chose not to call him because the court had denied the request to bifurcate. (JA 348-51).

C. The Decision to Forego Mitigating Evidence To Retry Guilt was Unreasonable.

Even assuming that Wiggins' lawyers faced a choice between challenging his guilt as a principal and offering mitigation evidence, it was unreasonable for them to make that choice without a reasonable investigation of the alternative. *Strickland*, 466 U.S. at 691.[11]

Before trial, Wiggins' lawyers faced evidence linking Wiggins to items taken from the victim's apartment: her car, credit cards, and an engagement ring. Each of these links depended to some degree on the testimony of Geraldine Armstrong, who had been arrested with Wiggins and charged with first degree murder. The lawyers were unsuccessful at demonstrating that Armstrong had been promised immunity to testify against Wiggins or mounting a serious challenge to her credibility. Her testimony that Wiggins drove the victim's car to her house on September 15, and then took Armstrong shopping with stolen credit cards connected Wiggins to the victim's property on the same day that he had been working near her apartment. The defense theory therefore hinged on proving that the victim was still alive on the following day, so that while Wiggins might be guilty of theft or receiving stolen property, he could not be guilty of murder. That argument turned on the testimony of a friend who recalled speaking to the victim on the 16th, and on medical testimony concerning time of death. Although at one time it may have appeared

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11 In *Strickland*, the tactical choice to throw the defendant upon the mercy of the sentencing judge was made by the defendant himself, after he confessed to two murders, waived a jury trial on guilt, and waived an advisory sentencing jury against the advice of counsel. 466 U.S. at 672-73. Counsel's decision to limit his investigation was reasonable, given the choice of strategy dictated by his client's actions.

that the defense would present undisputed testimony as to a time of death after September 15, that hope was scuttled before trial, when the medical examiner who performed the autopsy changed her estimated time of death. (JA 525-30). The defense also lost its expert witness, and had to scramble to find a substitute who had limited availability. (JA 534).

After the judge found Wiggins guilty, defense counsel asked for a continuance of the sentencing because the "defense has not completed its preparation to take this case to a sentencing phase." (JA 33). Counsel proffered that they had "many things to do, including examination of Wiggins by various experts." *Id.* The court granted the continuance with the prosecutor's consent. *Id.* At that point, counsel had ample opportunity to re-evaluate their strategy, and ample time to perform an investigation of mitigating evidence.

There were some obvious disadvantages to retrying guilt in the penalty phase. The most basic was the instruction to the jury that Wiggins had been convicted and that the jury was bound by that verdict. (JA 53; 362); see also JA 67(argument in support of motion for new trial discounting significance of jury verdict in penalty phase because it was bound by the guilt phase verdict). That instruction effectively nullified Wiggins' penalty phase defense, because his counsel offered no theory on which he could have been guilty of murder, but not be a principal. (JA 391)(closing argument)("you can't be sure that Kevin Wiggins had any role at all."). Thus, rather than a genuine challenge to the "principal" requirement, the penalty phase defense was really, as the trial prosecutor put it, a "back door" lingering doubt argument. (4/7/94 Tr. 66). See also JA 504-5 (explaining jury waiver to get "two shots at the principal issue."). As such, it was doomed to failure, because the sentencing jury had not decided guilt or innocence. Unlike a jury that had to wrestle with the liability determination in the guilt phase,

which may be inclined towards a life sentence because of lingering doubts about guilt, Wiggins' jury had no way of knowing what evidence had been presented in the guilt phase, or whether there were any reasons to doubt Wiggins' guilt. Counsel's decision to waive a jury trial in the guilt phase was at odds with a penalty phase defense premised on lingering doubt.[12]

Nor was it reasonable for defense counsel to retry guilt before a sentencing jury without at least considering the alternatives. Having decided to waive a jury trial in the guilt phase because of a belief that a death-qualified Baltimore County jury would be unreceptive and unfair, (JA 500), counsel could not have believed that it would be advantageous to retry guilt in the same forum they deliberately avoided earlier. The Maryland Court of Appeals was unreasonable in relying on the change in sentencer as a basis for distinguishing the many cases holding counsel ineffective for failing to investigate their clients' backgrounds. See Pet. App. 124a. Whatever force counsel's concerns about the composition of the jury pool and the process of death qualification may have carried in the guilt phase carried the same force in a penalty phase focused on guilt as a principal.

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12 Wiggins' lead counsel had been involved in only one prior capital case. (JA 474). In that case, he also tried the guilt phase to a judge and then challenged the principal finding in a jury trial. In *Doering*, however, there was no real dispute about guilt based on the defendant's confession, and a real dispute over who was the principal because another person was charged and convicted of participating in the homicide. See *Doering v. State*, 313 Md. 384 (1988). It may be that counsel simply recapitulated his strategy in the earlier case, even though that client was also sentenced to death.

There were other disadvantages to a retrial strategy as well. The prosecution, having had a preview of the defense, was able to strengthen its reprise presentation in the sentencing phase. The prosecution omitted the two jailhouse informants whose testimony the trial judge discredited and rejected entirely. It was able to elicit an in-court identification of Wiggins from a witness who saw him outside the victim's apartment, which it had been unable to do in the guilt phase. And it presented stronger expert testimony concerning the time of death. The defense, by contrast, had nothing to offer that it had not offered in the guilt phase.[13] Another disadvantage was that the wholesale attack on Wiggins' guilt allowed the prosecution to retry its case before the jury, including emotionally charged photographs of the crime scene and the victim that might not have been admissible in a hearing focused on Wiggins' background.

It was not reasonable for Wiggins' lawyers to choose the long odds of asking the sentencing jury to disagree with the guilt phase verdict without thoroughly investigating the alternatives. As discussed in the preceding section, in reality counsel's strategy was compatible with the presentation of Wiggins' background. But Wiggins' lawyers did not know that because they failed to look.

---

13 The defense called a new expert on time of death, but this was for reasons of availability.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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Petitioner,

v.

THOMAS R. CORCORAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*

The American Bar Association ("ABA") is the principal voluntary national membership organization of the legal profession. Its more than 400,000 members include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and a number of non-lawyer "associates" in allied fields.[1]

The ABA has a well-established tradition of advocating for the ethical and effective representation of all clients. For nearly one hundred years, the ABA has provided leadership in legal ethics and professional responsibility, establishing the foundation for a lawyer's obligations to his client in all representations. In 1908 the ABA adopted the original Canons of Professional Ethics and in 1913 the ABA established the Standing Committee on Professional Ethics. In 1969, the ABA adopted the Model Code of Professional Responsibility that was subsequently adopted by the vast majority of state and federal jurisdictions. In 1983, the ABA drafted the Model Rules of Professional Conduct. All but seven jurisdictions adopted the Model Rules. Finally,

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1. Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members, or counsel, has made a monetary contribution to this brief's preparation or submission. The parties have lodged letters with the Clerk expressing their blanket consent to the filing of *amicus* briefs.

Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No member of the Judicial Division Council has participated in the adoption or endorsement of the position in this brief, nor was it circulated to any member of the Judicial Division Council prior to filing.

building on the work of its "Ethics 2000" Commission, the ABA adopted amendments to the Model Rules in February of 2002.

The ABA takes no position on the death penalty as a general matter. However, the ABA has adopted numerous policies concerning the administration of justice and the effective representation of criminal defendants. The ABA is especially concerned about the effective representation of criminal defendants who might be or have been sentenced to death.[2] One of the several ABA entities that focus on legal issues related to capital punishment is the Special Committee on Death Penalty Representation, which recruits, trains, and supports volunteer counsel to represent death row inmates who lack lawyers.

In 1989, the ABA House of Delegates adopted Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines"; see* App. A1 – A17) which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the *minimal resources and practices necessary to provide effective assistance of counsel.*" ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (emphasis supplied); *see also* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) *("ABA Providing Defense Services Standards")* ("These guidelines are incorporated by

2. *See, e.g.*, ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 11 (3d ed. 1992) (*"ABA Providing Defense Services Standards"*) ("American Bar Association resolutions have frequently and consistently taken positions supporting the provision of quality representation by counsel in capital cases."); ABA House of Delegates Resolution 122, *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases* (1989) (*"ABA Death Penalty Guidelines"*); American Bar Ass'n, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 Am. U. L. Rev. 1, 13 (1990).

reference into the [*ABA Providing Defense Services Standards*]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) (*"ABA Prosecution Function and Defense Function Standards"*) ("Defense counsel should comply with the [*ABA Death Penalty Guidelines*]."). The Guidelines were based on the experiences of those who handled post-conviction cases on collateral review and the lessons learned from the pattern of inadequate, unprepared, and under-financed counsel who represented at trial those accused of capital crimes. The ABA called upon each death penalty jurisdiction to adopt the *ABA Death Penalty Guidelines*.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Lawyers handling capital cases cannot make key strategic decisions in consultation with their clients that are either constitutionally or ethically sufficient without conducting a reasonably complete and thorough investigation. Such an investigation is necessary with respect to all matters lawyers handle for their clients, but never more so than when lawyers and their clients must be properly informed with regard to the many choices that must be made concerning the guilt/innocence phase and the penalty phase of a capital trial. Decision-makers cannot act reasonably if they lack an informed basis for choosing one defense over another, one expert over none, or the presentation of some facts over others.

In a capital case, effective representation includes a *complete* investigation into all areas from which a reasonable attorney would develop mitigation evidence including, but not limited to, a client's cognitive and neurological condition and history; his family, friends and associates; school, employment and military records; medical history; and incarceration and corrections records, as well as other areas on which counsel is put on notice because of the

3. *See id.*

particular facts in the case. A reasonably conscientious investigation into each of those areas is also *thorough*.

Without such an investigation, counsel and client cannot effectively choose what, if any, mitigation evidence to present at trial because they will not know the likely benefits and costs of presenting it. The scope of pre-trial *investigation* is necessarily independent from the scope of trial *presentation*; a decision not to present evidence requires the same knowledge of that evidence and its implications as a decision to present the evidence. By conducting a complete and thorough pre-trial investigation into mitigation evidence, counsel protects the adversarial nature of the justice system and helps ensure that an individualized determination regarding the appropriateness of the death penalty will be made for the defendant.

The ABA respectfully submits that the *ABA Death Penalty Guidelines* represent a consensus within the profession regarding principles to guide capital defense counsel on the subject of mitigation evidence and the necessity of investigating the same. Long prior to the trial this Court now considers, the ABA informed the legal profession, through the *Guidelines*, about the scope of potentially mitigating evidence that could be available and warned lawyers against incomplete investigations. The *Guidelines* reflect the insight of practitioners with years of experience and the instruction of relevant case law and statutory provisions. The standard of care set forth in the *Guidelines* resulted from the ABA's study of what reasonably performing lawyers were doing and what ineffectively performing lawyers were not doing. The *Guidelines* are proffered to the Court, not as a substitute for counsel's own determination of the necessary scope of investigation presented by the unique character and background of his client, but rather as an essential starting point from which counsel should develop the individualized research necessary to humanize the client.

ARGUMENT

I. THE GUARANTEES OF THE SIXTH AND EIGHTH AMENDMENTS REQUIRE REASONABLE INVESTIGATION OF MITIGATION EVIDENCE.

A. The Sixth Amendment Requires Reasonable Investigation.

The right to effective counsel, which derives from the right to counsel, guarantees a defendant the assistance "necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984); *see also Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). As the Court made clear in *Strickland*, either the Government or defense counsel may be responsible for depriving the accused of the benefit of counsel. 466 U.S. at 686. Thus, either governmental stumbling blocks or defense counsel's ineptitude may undermine defense counsel's ability to make strategic and tactical decisions in an independent manner. *See id.* at 686, 689.

As identified by this Court, the basic duties of an effective lawyer are loyalty, avoidance of conflicts of interest, advocacy (described as the overarching duty), and consultation and communication with the client; "[c]ounsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688.

The *Strickland* presumption of effective representation[4] is premised upon a lawyer's strategic decision-making

4. Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. 668 at 689. Thus, lawyers are presumed effective unless the defendant can show that counsel's performance was deficient, i.e., "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *id.* at 687, and also that the deficient performance prejudiced the defense, i.e., "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.*

to promote his client's best interest. This presumption fails, however, if any of the assumptions underlying it fail. For example, if a lawyer is burdened by a conflict of interest, the Court can no longer assume that a lawyer is acting in the best interests of his client. *See Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978). And, as demonstrated in *Kimmelman v. Morrison,* 477 U.S. 365 (1986), a decision can be unreasonable because it is uninformed:

> The trial record in this case clearly reveals that Morrison's attorney failed to file a timely suppression motion, not due to strategic considerations, but because, until the first day of trial, he was unaware of the search and of the State's intention to introduce the bedsheet into evidence. Counsel was unapprised of the search and seizure because he had conducted no pretrial discovery. Counsel's failure to request discovery, again, was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned. . . . The justifications Morrison's attorney offered for his omission betray a startling ignorance of the law – or a weak attempt to shift blame for inadequate preparation. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Respondent's lawyer neither investigated, nor made a reasonable decision not to investigate, the State's case through discovery. Such a complete lack of pre-trial preparation puts at risk both the defendant's right to an " 'ample opportunity to meet the case of the prosecution,' " and the reliability of the adversarial testing process.

Id. at 385 (citations omitted).

For the *Strickland* presumption to stand, a lawyer's decisions must be formulated from a reasonable understanding of the law and the facts. *See id.* As with all obligations, the duty to investigate reasonably is not an independent good; rather, it is a means of ensuring that the adversarial process functions properly and that counsel's decisions are reasonable, tactical, and strategic. As a result, if lawyers' decisions are based on ignorance, they are neither reasonable nor strategic. *See, e.g., Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir. 1991) ("[O]ur case law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them."). If lawyers have not conducted a reasonable investigation, they do not have a reasonable understanding of the facts; consequently, they have nothing to which to apply their legal skill and judgment.

The *ABA Death Penalty Guidelines* reflect the professional norms in this area. They state that counsel should "conduct independent investigations . . . immediately upon counsel's entry into the case" and pursue them expeditiously. *See ABA Death Penalty Guidelines,* Guideline 11.4.1 ("Investigation") and cmt. ("Without investigation, counsel's evaluation and advice amount to little more than a guess.").

B. The Eighth Amendment Provides the Right to Present Mitigation Evidence for Use by the Capital Sentencer.

In 1976, this Court issued five decisions evaluating the constitutionality of death penalty statutes enacted by the states: three upholding the statutes, *Gregg v. Georgia,* 428 U.S. 153, 197, 206 (1976), *Proffitt v. Florida,* 428 U.S. 242, 251-52 (1976), *Jurek v. Texas,* 428 U.S. 262, 270-71 (1976), and two striking down the statutes as constitutionally infirm: *Woodson v. North Carolina,* 428 U.S. 280, 303-05 (1976), [*Stanislaus*] *Roberts v. Louisiana,* 428 U.S. 325, 333-34 (1976). Ten years later, this Court summarized the salient distinction between laws that satisfied constitutional mandates and those that did not:

> In the three cases upholding the guided-discretion statutes, the opinions emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual. . . . In the two cases striking down as unconstitutional mandatory capital-sentencing statutes, *the opinions stressed that one of the fatal flaws in those sentencing procedures was their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority.*

Sumner v. Shuman, 483 U.S. 66, 74 (1987) (emphasis supplied). In *Shuman*, while holding unconstitutional a Nevada statute mandating a capital sentence to any life-term inmate convicted of murder, this Court focused on the unique nature of mitigating evidence and the constitutional indispensability of access to that evidence.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 74-75 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

This principle has guided this Court in every evaluation it has made of the constitutionality of a state's sentencing scheme. Indeed, the line of cases culminating in *Mills v. Maryland*, 486 U.S. 367 (1988),[5] held that jury instructions could not serve to preclude jurors from considering mitigating evidence.

Moreover, this Court has made it clear that it is not enough for a defendant to be allowed to develop mitigating evidence. It is not even enough for a jury to be allowed to hear about and consider mitigating evidence. The sentencer must be in a position to *use* the mitigating evidence when deciding whether or not to impose the death sentence. As the Court explained:

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and *give effect* to [a defendant's mitigating] evidence in imposing sentence." For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence."

Penry v. Johnson, 532 U.S. 782, 797 (2001) (internal citations omitted) (emphasis in original).

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5. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (concluding that it was well established that a sentencer may not be precluded from considering any "aspect of a defendant's character or record and any of the circumstances of the offense" and "that a sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.") (citations omitted); *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

Likewise, if an aggravating circumstance – which constitutionally must serve to narrow the class of defendants who are death-eligible (*see, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988)) – is found to be invalid, then, where the capital sentencing scheme is predicated on the weighing of aggravating and mitigating circumstances, there must be an actual reweighing of the remaining aggravating factors against all of the mitigating evidence, effectuating the "new sentencing calculus." *Richmond v. Lewis*, 506 U.S. 40, 49 (1992) (reversing); *see also [Terry] Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751-52 (1990)).

In recognition of the critical nature of mitigation evidence, the *ABA Death Penalty Guidelines* recommend careful preparation by counsel for the penalty phase through proper investigation, consultation with the client, analysis of the prosecution's case and evaluation of all reasonably available evidence in mitigation. *See ABA Death Penalty Guidelines*, Guideline 11.4.1 ("Investigation"), 11.8.3 ("Preparation for the Sentencing Phase"), 11.8.5 ("The Prosecutor's Case at the Sentencing Phase"), and 11.8.6 ("The Defense Case at the Sentencing Phase").

C. The Guarantees of the Sixth and Eighth Amendments Cannot be Satisfied Without Reasonable Investigation of Mitigation Evidence.

Defense counsel's ineptitude cannot properly be allowed to prevent the sentencer from hearing, considering, and giving full effect to the mitigating evidence that it is the defendant's right to present. If lawyers do not articulate to the client the right to have mitigation evidence considered, the scope of that evidence, and the effect that evidence can have, the lawyers become obstacles to a constitutionally fair sentence. Indeed, the fundamental constitutional right to present "humanizing" information rings hollow unless defense counsel is aware of, and advises the defendant

about, the breadth of mitigating material about the defendant that is available for use in the penalty phase.

Because the purpose of the penalty phase is to determine whether the individual defendant, having been found guilty, deserves to be put to death, the *nature* of mitigating evidence is fundamentally different from the evidence sought and developed for the guilt/innocence phase. The defense is entitled to present evidence for the purpose of humanizing and individualizing the defendant. In order to develop such evidence for possible presentation, defense counsel must develop a deeper understanding of the defendant's current life and life history than is usually necessary for the guilt/innocence phase. Moreover, in deciding what mitigating evidence to present, counsel must be sensitive to its tone and character.

In *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002), the state court had postulated that the defendant had no mitigation evidence to present, and therefore that the decision to present none had been strategic. The district court disagreed, pointing out that "Brownlee's counsel had not done any investigation into Brownlee's background or character, so they did not know what evidence there might have been to present." *Id.* at 1068. The Eleventh Circuit affirmed, observing: "counsel's failure to investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse, undermines our confidence in Brownlee's death sentence." *Id.* at 1070. It concluded that counsel's failure to conduct any mitigation investigation was inherently unreasonable because it deprived the defendant of his opportunity to humanize himself before the sentencer.

The Eleventh Circuit's reasoning is particularly instructive:

> [t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing

[on] the particularized characteristics of the defendant. By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence. In this case, counsel's absolute failure to investigate, obtain, or present any evidence, let alone the powerful, concrete, and specific mitigating evidence that was available, prevented the jurors from hearing anything at all about the defendant before them. An individualized sentence, as required by the law, was therefore impossible. Instead, the jury was asked to decide Virgil Brownlee's fate without hearing anything about his borderline mental retardation, his schizotypal personality disorder, his antisocial personality disorder, his many drug and alcohol dependencies, or his history of seizures.

Id. at 1074 (citations and quotations omitted). *See also Caro v. Woodford*, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 122 S. Ct. 2645 (2002); *Coleman v. Mitchell*, 268 F.3d 417, 449-51 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 1639 (2002); *Jermyn v. Horn*, 266 F.3d 257, 307-308 (3d Cir. 2001); *accord [Terry] Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); *Battenfield v. Gibson*, 236 F.3d 1215, 1229 (10th Cir. 2001) ("[T]here was no strategic decision at all because Shook was ignorant of various other mitigation strategies he could have employed.").[6]

6. Nor may counsel excuse inaction because they think the investigation would be fruitless. Counsel may not "sit idly by, thinking that investigation would be futile." *Voyles v. Watkins*, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial, on grounds that he "did not think that it would do any good," constituted ineffective assistance).

II. TO BE REASONABLE, AN INVESTIGATION OF MITIGATION EVIDENCE SHOULD BE COMPLETE AND THOROUGH.

An investigation that may be adequate for the guilt/innocence phase may be wholly inadequate for the penalty phase. *See, e.g., [Terry] Williams v. Taylor*, 529 U.S. 362, 395 ("We are likewise persuaded that the Virginia trial judge correctly applied both components of [the *Strickland*] standard to Williams' ineffectiveness claim. Although he concluded that counsel competently handled the guilt phase of the trial, he found that their representation during the sentencing phase fell short of professional standards – a judgment barely disputed by the State in its brief to this Court."). *See also Marshall v. Hendricks*, 307 F.3d 36 (3d Cir. 2002) (remanding for further evidentiary development, since the record reflected adequate investigation for the guilt phase but no investigation for the penalty phase).

The ABA has long stressed that investigation into mitigation evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *ABA Death Penalty Guidelines*, Guideline 11.4.1(C) ("Investigation"); *see also ABA Prosecution Function and Defense Function Standards*, Standard 4-4.1 ("Duty to Investigate") ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and *the penalty in the event of conviction*") (emphasis supplied)). By implication, these ABA policies encompass two aspects of investigation: (1) the breadth of the investigation (*where* counsel must research); and (2) the depth of the investigation (*how far* counsel must research in any particular area). In other words, the independent pretrial investigation into mitigation evidence must be both: (1) complete; and (2) thorough.

A. A Reasonable Mitigation Investigation Is Complete.

The areas of possible mitigation are numerous. They include any evidence that tends to lessen the defendant's moral culpability for the offense or would otherwise support a sentence less than death. *See Penry v. Lynaugh,* 492 U.S. 302, 327-28 (1989) ("[I]t is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense."); *Skipper v. South Carolina,* 476 U.S. 1, 4-5 (1986) (evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Therefore, a reasonable independent pre-trial investigation into mitigation evidence should be "complete" in the sense that counsel should examine all areas where reasonable capital defense attorneys generally search for mitigation evidence *and* any other areas of which counsel are on special notice in their particular case.

The *ABA Death Penalty Guidelines,* adopted in 1989, discuss types of mitigation evidence that counsel should investigate, and sources of that evidence, both through examination of records and through interviews. Counsel should:

> collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services); and religious and cultural influences.

ABA Death Penalty Guidelines, Guideline 11.4.1(D)(2)(C) ("Investigation"). If it seems unnecessary for the ABA to set forth such a commonsense catalogue of areas of inquiry, only a brief perusal of actual "investigations" undertaken shows that it is, indeed, necessary. Counsel in the instant case did not make any effort to follow the guidance set forth in these *Guidelines.*

B. A Reasonable Mitigation Investigation Is Thorough.

Thorough investigation and planning for mitigation must begin immediately upon counsel's acceptance of representation. *See [Terry] Williams v. Taylor,* 529 U.S. 362, 395-396 (2000) (notwithstanding fact that trial counsel "competently handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); *ABA Death Penalty Guidelines,* Guideline 11.4.1 ("Investigation"); *ABA Prosecution Function and Defense Function Standards,* Standard 4-4.1(a) ("Duty to Investigate") ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction . . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.").

A perfunctory or *de minimis* investigation into one or all areas that a reasonable attorney would research does not satisfy the guarantees of the Sixth and Eighth Amendments. Lawyers, in consultation with their client, cannot make a valid strategic decision about the presentation of mitigating evidence without a reasonable understanding of *all* available mitigating evidence. Skimming through a capital defendant's psychosocial history or, as here, childhood social service records, does not provide the necessary depth of understanding to enable either the lawyers or the client to make informed strategic decisions.

Lawyers need to look reasonably deeply into each mitigation area they investigate (*e.g.* family, friends, co-workers, school records and medical records). Counsel cannot surrender simply because their first steps are frustrated, or because they find some information that they are unlikely to present. As this Court stated in *[Terry] Williams v. Taylor*:

> Of course, not all of the additional evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system – for aiding and abetting larceny when he was 11 years old, for pulling a false fire alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

529 U.S. at 396.

While this Court has upheld some decisions by counsel not to present mitigating evidence, the Court has premised

such findings on counsel's having made fully informed decisions. The Court has looked into the investigation and counsel's handling of the results of the investigation before finding reasonable the decision not to present the evidence that was found. *See Darden v. Wainwright*, 477 U.S. 168, 185 (1986) ("The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing."); *Burger v. Kemp*, 483 U.S. 776, 790 (1987) ("Based on these interviews, Leaphart made the reasonable decision that his client's interest would not be served by presenting this type of evidence."); *Bell v. Cone*, 535 U.S. 685, * * *; 122 S. Ct. 1843, 1853 (2002) (counsel utilized "what he believed to be the most compelling mitigating evidence in the case" extensively at trial and weighed the possibility of recalling witnesses or calling other witnesses in the penalty phase).

Sometimes, however, even a fully informed decision not to present mitigation evidence can be unreasonable. Once counsel are aware that the evidence exists, they must evaluate its potential benefit or harm by examining it and subjecting it to proper consideration. *See, e.g., Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) ("By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons' attorney's representation was ineffective."); *accord Karis v. Calderon*, 283 F.3d 1117, 1136 (9th Cir. 2002), *cross-petitions for cert. filed* (Sept. 18, 2002) (No. 02-434); (Sept. 10, 2002) (No. 02-6265) ("Despite his conceded knowledge of this history, counsel failed to present any evidence of Karis's family abuse to the jury.").

C. A Complete and Thorough Mitigation Investigation Is Conducted by Counsel Independently and With the Assistance of Experts.

1. Counsel Should Conduct the Mitigation Investigation Independently.

Lawyers may not rely upon their own client for all of the available information that could be proffered to convince a jury to impose a sentence other than death. Nor may counsel fail to conduct an investigation because of the client's desire not to present mitigating evidence. *See, e.g., Carter v. Bell,* 218 F.3d 581, 596 (6th Cir. 2000) ("The sole source of mitigating factors cannot properly be that information which defendant may volunteer; counsel must make some effort at independent investigation in order to make a reasoned, informed decision as to their utility. We find that reluctance on Carter's part to present a mental health defense or to testify should not preclude counsel's investigation of these potential factors."); *Blanco v. Singletary,* 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *ABA Death Penalty Guidelines,* Guideline 11.4.1(C) ("Investigation") ("The investigation for preparation of sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.").

Counsel should never underestimate how much shame, embarrassment, and anguish certain mitigation evidence, such as childhood sexual abuse or other traumas, mental retardation or other developmental or mental disorders, causes defendants. The defendant may have repressed much of the information. In some cases, the defendant may not even comprehend the information. Even where a defendant is aware of the problem and can identify it, the defendant may have gone to great lengths to keep the information

hidden, and will be at best reluctant to divulge it to a lawyer. *See, e.g., Daniels v. O'Connor,* 243 So. 2d 144, 147 (Fla. 1971) (remarking that a mentally ill defendant "might mislead his counsel as to facts, misinform them as to his relations with other actors in the legal drama, and be utterly unreliable as a witness in his own behalf.") (quoting *State ex rel. Deeb v. Campbell,* 167 So. 805, 806 (Fla. 1936)).[7]

Many capital defendants have had prior experience with defense lawyers, and much of it has been bad, making these defendants even less forthcoming. *See* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care,* 1993 U. Ill. L. Rev. 323, 338 (1993) ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. . . . [Thus,] a capital defendant . . . understandably will be reluctant to trust his attorney."). Finally, even if the defendant eventually is willing to share the information, this may not occur until much later in the representation, long after it will do the most good.

A history of physical, emotional, and sexual abuse, combined with neurological and psychiatric impairment, including mental retardation, is prevalent among defendants charged with violent crimes. *See, e.g.,* Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 Santa Clara L. Rev. 547 (1995); Dorothy O. Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States,* 143:7 Am. J. Psychiatry 838-45 (1986).

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7. A defendant may, for example, go to great lengths to hide a developmental delay or mental retardation, but it is imperative that lawyers be aware of these limitations. *See, e.g.,* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants,* 53 Geo. Wash. L. Rev. 414, 484-86 (1985); *Atkins v. Virginia,* 536 U.S. 304, 350 (2002) (holding that mentally retarded defendants may not constitutionally be executed).

Moreover, many mentally ill defendants self-medicate with drugs and alcohol, which further compounds their condition. A defendant's perceptions and ability to communicate may be limited by substance abuse, mental illness, or developmental problems.

An additional danger is that counsel, who are untrained and unadvised in these areas, will not know when or to what extent such a limitation exists. Thus, what counsel do not see – and do not secure expert advice on – may limit the lawyers' ability to represent their client and may unreasonably restrict the scope of their investigation. Counsel must therefore rely on sources of information other than the client to obtain all potentially relevant mitigation evidence.

2. Counsel Should Conduct the Mitigation Investigation with the Assistance of Experts.

The duty to consult one or more experts is often of critical importance. Lawyers are not equipped to assess a person's intelligence or mental state, although a client's behavior might put them on notice that these factors are at issue. *See Hull v. Freeman*, 932 F.2d 159, 168 (3d Cir. 1991) ("[F]ew lawyers possess even a rudimentary understanding of psychiatry. They therefore are wholly unqualified to judge the competency of their clients."). A lawyer is an expert in the law, not in psychiatry, medicine, or social work. In addition to the special skills and training required to discover mitigation evidence, complex or apparently conflicting records may need to be explained to the decision-maker by one or more competent experts. *See ABA Death Penalty Guidelines*, Guideline 11.8.6 ("The Defense Case at the Sentencing Phase"). Further, as this Court has recognized, "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985).

It is important for defense counsel to secure expert advice for another reason: when the case is one in which the death penalty will be sought, the prosecution regularly calls experts. *See* Subcommittee on Federal Death Penalty Cases Committee on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* at 24 (1998) (*"Federal Death Penalty Cases"*) (discussing federal death penalty cases), *available at* http://www.uscourts. gov/dpenalty/1COVER.htm (reporting that "both the prosecution and the defense rely more extensively on experts in death penalty cases" than in other criminal cases); *People v. Bell*, 505 N.E. 2d 365, 371 (Ill. App. 1987) (finding a lack of zealous representation where defense counsel did not seek an independent evaluation to counter the psychiatric report proffered by the prosecutor). The penalty phase, no less than a trial, is an adversary proceeding. Lawyers must be prepared to meet the prosecutor's evidence as well as plead on their client's behalf.

III. COUNSEL HAS AN ETHICAL OBLIGATION TO CONDUCT A REASONABLE INVESTIGATION INTO MITIGATION EVIDENCE.

The ethical obligation of a lawyer in a capital case with respect to mitigation matters is no different from the ethical obligation all lawyers have to premise informed strategic decision-making upon an investigation into the law and facts sufficient to make the decisions informed ones. This obligation is reflected in the ABA's Model Rules of Professional Conduct and every state's ethical code, which uniformly require complete and thorough investigation in order for a lawyer to provide competent and diligent counsel. *See* Model Rules of Prof'l Conduct R. 1.1 & R. 1.3 (2002); *see also* Peter A. Joy and Robert R. Kuehn, *Conflict of Interest and Competency Issues in Law Clinic Practice*, 9 Clinical L. Rev. 493, 497 n.11 (2002).

All lawyers are bound by the obligations of the applicable rules of professional conduct. As this Court recognized in *Strickland*, the function of the ethical codes is to enforce counsel's adherence to their basic duties: loyalty, avoidance of conflicts of interest, advocacy, consultation and communication with the client, and skill and knowledge. 466 U.S. at 688. The Model Rules classify these duties as duties of competence, diligence, and communication. *See* Model Rules of Prof'l Conduct R. 1.1, 1.3, 1.4.

The Model Rules, like *Strickland*, employ a standard of reasonableness to assess a lawyer's behavior. Using "the skill and knowledge normally possessed by members of that profession or trade in good standing . . ." fulfills the duty of competence. Restatement (Third) of the Law Governing Lawyers § 52 cmt. b (2000) (quoting Restatement (Second) of Torts § 299A). A lawyer violates his duties of competence and diligence when he fails to prepare adequately and fails to inquire into or suitably evaluate the factual elements of the case before him. *See* Restatement (Third) of the Law Governing Lawyers § 16 cmt. d; § 52 cmt. c (2000); Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002).

When courts evaluate claims of attorney incompetence or lack of diligence, they look to two things: (1) what is at stake and (2) whether a lawyer reached a tactical decision based on the facts and the law, or whether he merely *surmised* that a particular course of action should be undertaken. *See* Model Rules of Prof'l Conduct R. 1.1 cmt. 5 (2002) ("[M]ajor litigation . . . ordinarily require[s] more extensive treatment than matters of lesser complexity and consequence."); 4 Ronald E. Mallen & Jeffrey-M. Smith, Legal Malpractice § 30.27 at 528 (5th ed. 2000); *see also Wagenmann v. Adams*, 829 F.2d 196 (1st Cir. 1987).

Although the duties to be competent and diligent are distinct from the duty to communicate, a lawyer cannot fulfill the duty to communicate with his client if he has not first been competent and diligent. *See, e.g., Attorney Grievance Comm'n v. Zdravkovich*, 762 A.2d 950, 963-64

(Md. 2000) (failure to exercise diligence leading to the failure to keep the client reasonably informed). If lawyers do not conduct an adequate investigation into all potentially available areas of mitigation evidence that can be presented in the penalty phase, they will not have sufficient information to make informed decisions as to those decisions he will make; nor will the client have sufficient information to "participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Model Rules of Prof'l Conduct R. 1.4 cmt. 5 (2002).

The duty to communicate takes on added significance as the role of the client becomes more important to the decision-making process. That role is recognized in the rules of professional conduct that specifically address the allocation of responsibility between the lawyer and the client. As the Model Rules observe, "[the] client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Model Rules of Prof'l Conduct R. 1.2 cmt. 1 (2002). Thus, the ABA's ethical standards for the profession attach the same importance to full investigation and consultation with the client as is reflected in the constitutional jurisprudence of capital litigation.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the decision of the Fourth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases

APPENDIX: GUIDELINE 11.3 – DETERMINING THAT DEATH PENALTY IS BEING SOUGHT

Counsel appointed in any case in which the death penalty is a possible punishment should, even if the prosecutor has not indicated that the death penalty will be sought, begin preparation for the case as one in which the death penalty will be sought while applying strategies to have the case designated by the prosecution as a non-capital one.

Commentary:

Jurisdictions may vary in how and when the prosecutor makes the determination of whether to request the death penalty. Jurisdictions vary significantly as to when the defense must be notified of the specific aggravating factors upon which the prosecution will rely in seeking the death penalty.[1] If there is any possibility that the death penalty will be sought, counsel should proceed as if it will be sought. As is set out in Guideline 11.4, early investigation is a necessity, and should not be put off on some possibility that the death penalty will not be requested, or that the request will be dropped at a later point.[2]

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1. A list of cases from jurisdictions requiring specific aggravating factors to be disclosed prior to the guilt/innocence trial and from jurisdictions with no such requirement is found in *Williams v. State*, 445 So.2d 798, 804-05 (Miss. 1984) *cert. denied sub nom. Williams v. Mississippi*, 469 U.S. 1117; 105 S. Ct. 803; 83 L. Ed.2d 795 (1985). One of the cases cited is *Sireci v. State*, 399 So.2d 964 (Fla. 1981). In rejecting the defendant's claim that aggravating circumstances had to be listed in the indictment, the court said that "when one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death...," 399 So.2d at 970. *Sireci* has been cited in a later decision precluding the trial court from ruling prior to the guilt/innocence phase on the propriety of the case being pursued as a death penalty case, *State v. Bloom*, 497 So.2d 2, 3 (Fla. 1986).

2. California Attorneys for Criminal Justice & California Public Defenders Association, *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, Vol. 1, p. A-13 *et seq.* (1986), citing *inter alia Leo v. Superior Court*, 179 Cal. App. 3d 274; 225 Cal. Rptr. 15 (1986) review denied 6/20/86. In *Leo*, the court found no bar to the prosecution pursuing the death penalty despite having initially told the defense (almost four months earlier) that death would not be sought, so long as the case was still in the pretrial stage.

If required notice has not been given, counsel is "under no duty to invite a death penalty prosecution."[3] While preparing for a capital case when notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[4]

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3. Dept. of Public Advocacy, *KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL*, p. 290 (1983).

4. *Id.*

APPENDIX: GUIDELINE 11.4.1 - INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty; and

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment.

As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, and special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision in the institution/education or training/clinical services); and religious and cultural influences;

D. seek necessary releases for securing confidential records relating to any of the relevant histories; and

E. obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in (C) above.

3. Potential Witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other mitigating evidence to show why the client should not be sentenced to death; and

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should attempt a prompt request to the police or investigative agency for any physical

evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions).

7. Expert Assistance:

Counsel should secure the assistance of experts where it is necessary or appropriate for:

A. preparation of the defense;

B. adequate understanding of the prosecution's case;

C. rebuttal of any portion of the prosecution's case at the guilt/innocence phase or the sentencing phase of the trial; and

D. presentation of mitigation.

Experts assisting in investigation and other preparation of the defense should be independent and their work product should be confidential to the extent allowed by law. Counsel and support staff should use all available avenues including signed releases, subpoenas, and Freedom of Information Act requests, to obtain all necessary information.

Commentary:

Counsel has a duty to investigate the case before recommending that a guilty plea be taken (or sought) or proceeding to trial.[1] This duty is intensified (as are many duties) by the unique nature of the death penalty[2] and is

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1. *ABA Standards*, The Defense Function, Standards 4-4.1 and 4-6.1; NLADA, *Performance Guidelines For Criminal Defense Representation* (Draft Guideline 4.1).

2. *Strickland v. Washington*, 466 U.S. 668, 706; 104 S. Ct. 2052; 80 L.Ed.2d 674 (1984) (Brennan, J., dissenting in part, concurring in part).

broadened by the bifurcation of capital trials into two phases.[3]

The need for a standard mandating investigation for the sentencing phase is underscored by cases in which counsel failed to recognize the importance of this aspect of death penalty litigation. Inexperienced counsel – and even counsel experienced in non-capital cases – "may underestimate the importance of developing meaningful sources of mitigating evidence..."[4] *See* Guideline 11.8 and commentary.

Counsel's duty to investigate is not negated by the expressed desires of a client. Nor may counsel "sit idly by, thinking that investigation would be futile".[5] The attorney must first evaluate the potential avenues of action and then advise the client on the merits of each.[6] Without investigation, counsel's evaluation and advice amount to little more than a guess.

Resources that counsel needs to pursue a proper investigation should be sought early in the case. The type and amount of assistance that can or will be made available aries from jurisdiction to jurisdiction; counsel should

3. *See* Streib, *Execution Under the Post-Furman Capital Punishment Statutes: the Halting Progress from "Let's Do It" to "Hey, There Ain't No Point in Pulling So Tight"*, 15 Rutgers L. J. 443, 446 (1984).

4. Devine, *et al, Special Project: The Constitutionality of the Death Penalty in New Jersey*, 15 Rutgers L.J. 261, 293 (1984).

5. *Voyles v. Watkins*, 489 F. Supp. 901, 910 (N.D. Miss. 1980). *People v. Ledesma*, 43 Cal.3d 171, 200-204, 207-209, 221-223; 238 Cal. Rptr. 404; 729 P.2d 839 (1987).

6. *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986), citing *inter alia Gray v. Lucas*, 677 F.2d 1986, 1093-1094 (5th Cir. 1982). Despite its recognition of the need for investigation, the *Thompson* court cited *Strickland v. Washington, supra*, n. 2, and declined to reverse where the attorney had failed to investigate the co-defendant's background, and had not contacted for sentencing purposes the psychiatrists who had previously examined the defendant.

demand on behalf of the client all necessary experts for preparation of both phases of trial.[7]

Individuals assisting in investigation should be within the confidences of the client and defense counsel, and should not be required to disclose information discovered during the investigation except at the direction of counsel.[8]

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but to try to prevent uncounselled confessions[9] or admissions:

> Don't forget, the defendant is a part of this team. From the initial interview forward[,] the bond you develop with the defendant is important in how you are able to handle the case. Your initial interview will often, by necessity, be hasty. Strongly admonish your client to talk or write to no one regarding the case. A former client of this author is sitting on death row in part because of devastatingly harmful letters that client wrote after the appointment of counsel. This admonition should be renewed regularly during trial, after conviction, and throughout the appellate process. In the event of a retrial, damaging post-trial statements may crucify your client.
>
> As soon as time permits arrange for an in-depth interview with your client with an eye toward both

7. The Supreme Court has recognized that indigent defendants are entitled to some forms of expert assistance, *see Ake v. Oklahoma*, 470 U.S. 68; 105 S. Ct. 1087; 84 L.Ed. 2d 53 (1985). Some states provide funds by statute for preparation of a capital case, *e.g.*, California Penal Code § 987.9.

8. The California statute providing funds for defense investigation in capital cases shields even the request for assistance from the prosecutor, Cal. Penal Code § 987.9; *see People v. Corenevsky*, 36 Cal.3d 307, 321; 204 Cal. Rptr. 165; 682 P.2d 360 (1984).

9. *See* Gradess, *The Road From Scottsboro*, Vol. 2, #2 *Criminal Justice* (Magazine of the ABA Section on Criminal Justice), p. 1, 45 (Summer 1987).

> developing the necessary trust and eliciting as many facts as you can to start you on the road to formulating your defense. . . [10]

Client interviews are vital for establishing the trust between attorney and client necessary to allow the attorney to learn the facts. Counsel cannot frame an adequate defense without knowing what is likely to develop at trial, including information that is or that appears to be incriminating.[11]

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10. Indiana Public Defender Council, *INDIANA DEATH PENALTY DEFENSE MANUAL*, Vol. 1, p. 1.1-6 (1985).

11. *ABA Standards*, The Defense Function, Standard 4-3.2 commentary.

APPENDIX: GUIDELINE 11.8.3 - PREPARATION FOR THE SENTENCING PHASE

A. As set out in Guideline 11.4.1, preparation for the sentencing phase, in the form of investigation, should begin immediately upon counsel's entry into the case. Counsel should seek information to present to the sentencing entity or entities in mitigation or explanation of the offense and to rebut the prosecution's sentencing case.

B. Counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between strategy for the sentencing phase and for the guilt/innocence phase.

C. Prior to the sentencing phase, counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing. Counsel should discuss with the client the accuracy of any information known to counsel that will be presented to the sentencing entity or entities, and the strategy for meeting the prosecution's case.

D. If the client will be interviewed by anyone other than people working with defense counsel, counsel should prepare the client for such interview(s). Counsel should discuss with the client the possible impact on the sentence and later potential proceedings (such as appeal, subsequent retrial or resentencing) of statements the client may give in the interviews.

E. Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing entity or entities.

F. In deciding which witnesses and evidence to prepare for presentation at the sentencing phase, counsel should consider the following:

1. witnesses familiar with and evidence relating to the client's life and development, from birth to the time of sentencing, who would be favorable to the client, explicative of the offense(s) for which the client is being sentenced, or would contravene evidence presented by the prosecutor;

2. expert witnesses to provide medical, psychological, sociological or other explanations for the offense(s) for which the client is being sentenced, to give a favorable opinion as to the client's capacity for rehabilitation, etc. and/or to rebut expert testimony presented by the prosecutor;

3. witnesses with knowledge and opinions about the lack of effectiveness of the death penalty itself; and

4. witnesses drawn from the victim's family or intimates who are willing to speak against killing the client.

Commentary:

All commentary concerning sentencing is found after Guideline 11.8.6, the last Guideline in subsection 11.8.

APPENDIX: GUIDELINE 11.8.5 – THE PROSECUTOR'S CASE AT THE SENTENCING PHASE

A. Counsel should attempt to determine at the earliest possible time what aggravating factors the prosecution will rely on in seeking the death penalty and what evidence will be offered in support thereof (Guideline 11.3). If the jurisdiction has rules regarding notification of these factors, counsel should object to any non-compliance, and if such rules are inadequate, should consider challenging the adequacy of the rules.

B. If counsel determines that the prosecutor plans to rely on or offer arguably improper, inaccurate or misleading evidence in support of the request for the death penalty, counsel should consider appropriate pretrial or trial strategies in response.

Commentary:

All commentary concerning sentencing is found after Guideline 11.8.6, the last Guideline in subsection 11.8.

APPENDIX: GUIDELINE 11.8.6 - THE DEFENSE CASE AT THE SENTENCING PHASE

A. Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence.

B. Among the topics counsel should consider presenting are:

1. medical history (including mental and physical illness or injury, alcohol and drug use, birth trauma and developmental delays);

2. educational history (including achievement, performance and behavior), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof;

3. military service, (including length and type of service, conduct and special training);

4. employment and training history (including skills and performance and barriers to employability);

5. family and social history (including physical, sexual or emotional abuse, neighborhood surroundings and peer influence); and other cultural or religious influence, professional intervention (by medical personnel, social workers, law enforcement personnel, clergy or others) or lack thereof; prior correctional experience (including conduct or supervision in institutions/education or training/clinical services);

6. rehabilitative potential of the client;

7. record of prior offenses (adult and juvenile), especially where there is no record, a short record or a record, of non-violent offenses; and

8. expert testimony concerning any of the above and the resulting impact on the client, relating to the

offense and to the client's potential at the time of sentencing.

C. Counsel should consider all potential methods for offering mitigating evidence to the sentencing entity or entities, including witnesses, affidavits, reports (including, if appropriate, a defense presentence report which could include challenges to inaccurate, misleading or incomplete information contained in the official presentence report and/or offered by the prosecution, as well as information favorable to the client), letters and public records.

D. Counsel may consider having the client testify or speak during the closing argument of the sentencing phase.

Commentary:

Sentencing proceedings in a capital case resemble a separate trial more than they resemble non-capital sentencing proceedings.[1] The Constitutional due process right to present evidence, as well as the right to counsel, to confront the witnesses against the defendant, and to not be placed twice in jeopardy, adhere to capital sentencing proceedings.[2] Experienced criminal counsel familiar with sentencing practices in non-capital cases may not recognize the different form of advocacy required at a death penalty sentencing trial.[3]

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1. *Bullington v. Missouri*, 451 U.S. 430, 438-446; 101 S. Ct. 1852; 68 L.Ed.2d 270 (1981).

2. *Id.; Specht v. Patterson*, 386 U.S. 605; 87 S. Ct. 1209; 18 L.Ed.2d 326 (1967); *Lockett v. Ohio*, 438 U.S. 586, 604; 98 S. Ct. 2945, 2981; 57 L.Ed.2d 973 (1978). There is, however, no constitutional right to have a jury decide the sentence, *Spanziano v. Florida* 468 U.S. 447; 104 S. Ct. 3154; 82 L.Ed.2d 340 (1984).

3. Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. Rev. 274 (1983), cited in Weinheimer and Millman, *Legal Issues Unique to the Penalty Trial*, The Champion, p. 33, reprinted in California Attorneys for Criminal Justice & California Public Defenders Association, *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, Vol. 11, p. H-14 (1986).

The evidence to be presented by the defense — indeed, the whole theory of the proceeding — at the sentencing phase stands outside normal criminal trial practice. Attorneys skilled in narrowing the focus of trial to exclude irrelevant references to the life and character of a client may find themselves unprepared for the sentencing phase of a capital case where the life and character of the client may have to be revealed in detail. The assistance of one or more experts (*e.g.*, social worker, psychologist, psychiatrist, investigator, etc.) may be determinative as to outcome,[4] as set out in Guideline 11.4.1(A) and 11.4.1(7). Unless a plea bargain has resulted in a guarantee on the record that the death penalty will not be imposed, full preparation for a sentencing trial must be made in every case.

Counsel should consider contacting the victim's family concerning the sentencing phase. The 1987 Supplement to the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL* discussed the power of testimony by a victim's relatives that they do not want the defendant killed. It also discusses the fact that the legal basis for such testimony is not yet clearly established.[6]

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4. Stebbins and Kenny, *Zen and the Art of Mitigation Presentation, or, the Use of Psycho-Social Experts in the Penalty Phase of a Capital Trial.* The Champion (Aug 1986) reprinted in *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3, Vol. 11, p. 87 H-37 *et seq.* (1987 Supp.).

5. Indiana Public Defender Council, *INDIANA DEATH PENALTY DEFENSE MANUAL*, Vol. 11, p. 6-1 (1985).

6. *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 4, Vol. 11, p. 87 H-89 (1987 Supp.); *see also Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1987), disallowing such testimony.

Roy Persons, whose wife Carol was murdered, said in a letter to the *St. Petersburg (Florida) Times* that he would have been "willing to testify in court that I or Carol would not have wanted (the defendant) to be sent to his death" but that his understanding was that such testimony "would not have been legal." Taken from "The Victims Speak", a pamphlet printed by the Institute for Southern Studies.

Along the same lines, counsel may consider seeking testimony from witnesses familiar with the actual process of an execution or having some expertise on the low deterrent value of capital punishment.[7] The legal basis for such testimony is also not yet clearly established.[8] But while counsel cannot be required to offer evidence held inadmissible by prevailing case law, counsel should consider whether such evidence might have value in a given case and whether (if it is barred by current case law in the jurisdiction) the question of admissibility should be preserved for appeal.

Obviously, the uniqueness of every client makes guidelines as to the sentencing phase a starting point, not a checklist.[9] However, counsel in every capital case should consider strategies offered by other attorneys, discussed in the literature or otherwise available for consideration. Counsel may not choose, without investigation and preparation, to sit back and do nothing at sentencing.[10] Even the client may not be able to mandate that counsel present no mitigation, for courts have found that public policy should not allow state-assisted suicide.[11]

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7. Balske, New Strategies for The Defense of Capital Cases, 13 Akron Law Rev. 331, 358, 359 (1979) reprinted in the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3.

8. *People v. Harris*, 28 Cal.3d 935, 962; 171 Cal. Rptr. 679; 623 P.2d 240 (1981) (trial court properly excluded testimony about how the death penalty is carried out). *State v. Jenkins*, 15 Ohio St. 3d 164; 473 N.E.2d 264, 289 (1984) (testimony on non-deterrent value of the death penalty not admissible). *See* cases cited in Dept. of Public Advocacy, *KENTUCKY PUBLIC ADVOCATE DEATH PENALTY MANUAL*, p. 328-333 (1983).

9. *CALIFORNIA DEATH PENALTY DEFENSE MANUAL, supra* n. 3, Vol. 11, p. H-4.

10. *Pickens v. Lockhart*, 714 F.2d 1455, 1467 (8th Cir. 1983).

11. *People v. Deere*, 41 Cal. 3d 353, 365; 222 Cal. Rptr. 13; 710 P.2d 925 (1985).

Because the scope of evidence admissible in mitigation is generally broader than that admissible in aggravation,[12] counsel may be seeking to adduce evidence of a type prohibited to the prosecution. Counsel should be prepared to object to inadmissible evidence proffered by the prosecutor. Counsel should also be prepared to object to information regarding the client that might be admissible in a non-capital sentencing proceeding but would constitute a denial of due process in the ratified atmosphere of a death penalty case.[13] Assertions that the client has engaged in unadjudicated criminal conduct have been held to deny due process in at least some death penalty cases,[14] while information regarding uncharged crimes may be admissible in the less formal sentencing proceedings occurring in non-capital cases.

The goal at the sentencing phase is to help the jury see the client as someone they do not want to kill. The decision as to whether to have the client testify can be crucial. Especially if the client is not to testify for some strategic reason, counsel may consider having the client speak during the closing argument or to otherwise speak in the jury's presence.[15]

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12. *See, e.g., Green v. Georgia*, 442 U.S. 95; 99 S. Ct. 2150; 60 L.Ed.2d 738 (1979) (hearsay offered by the defendant can come in where there were indicia of reliability, as a matter of due process).

13. The United States Supreme Court recently held that victim impact statements relating to the effect of a killing on the victim's family may not be used by the prosecution at the sentencing phase of a death penalty case. The Court specifically distinguished death cases from all others, *see Booth v. Maryland*, 482 U.S. 496 (1987); 107 S. Ct. 2529; 96 L.Ed.2d 440 (1987).

14. *State v. McCormick*, 22 Ind. 272; 397 N.E.2d 276 (1979); *but see Milton v. Procunier*, 744 F.2d 1091 (5th Cir. 1984).

15. *See, e.g.*, Balske, *Putting It All Together: The Penalty-Phase Closing Argument*. The Champion, (March 1984) p. 47, reprinted in the *CALIFORNIA DEATH PENALTY DEFENSE MANUAL*, *supra* n. 3, p. H-227.

No. 02-311

FEB 18 2003

IN THE SUPREME COURT OF THE UNITED STATES

KEVIN WIGGINS, *Petitioner,*

v.

SEWALL SMITH, Warden, *Respondent.*

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, COLORADO, GEORGIA, ILLINOIS, INDIANA, LOUISIANA, MONTANA, NEBRASKA, NEVADA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH DAKOTA, UTAH, VIRGINIA, AND WASHINGTON IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Maryland Court of Appeals' ruling, denying petitioner's claim of ineffective assistance of counsel, was "contrary to" or an "unreasonable application of" this Court's "clearly established" Sixth Amendment jurisprudence.

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In the Supreme Court of the United States

No. 02-311

KEVIN WIGGINS, *Petitioner,*

v.

SEWALL SMITH, Warden, *Respondent.*

INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus proceedings undermines public safety, deterrence of crime, retribution, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in any later re-trial of the criminal case. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress entrusted to the state courts the primary responsibility for ensuring that their criminal trials conform with constitutional norms. Overly intrusive habeas corpus review by the federal courts is disrespectful to the States and inconsistent with Congress' plan.

STATEMENT OF THE CASE

Petitioner Kevin Wiggins was convicted, in a trial before a judge, of the 1988 murder of an elderly woman, Florence Lacs, in Maryland. The conviction rested on circumstantial evidence. Petitioner, working temporarily at the apartment complex where she lived, was seen talking to Mrs. Lacs on a Thursday afternoon. He then lingered at the complex for no apparent reason after his release from work. By that evening, he was in possession of Mrs. Lacs' automobile and jewelry and was using her credit cards. Police found Mrs. Lacs' body, drowned in the bathtub in her ransacked apartment, on Saturday. The body was dressed in the clothing she had worn on Thursday, and the condition of the body was consistent with the theory that she might have been killed as early as Thursday. *Wiggins v. State*, 597 A.2d 1329, 1361-1365 (Md. 1991).

The penalty phase of the trial was tried to a jury. To obtain a death sentence under Maryland law, the prosecution at the penalty phase was required to prove, beyond a reasonable doubt, that petitioner personally had killed the victim. J.A. 363; see Md. Code Ann., art. 27, § 413. Defense counsel—having uncovered some evidence of physical and sexual abuse in petitioner's childhood and having obtained a psychiatric opinion about petitioner's mental health—asked the judge to "bifurcate" the sentencing trial so that the defense first could contest "principalship" separate from litigating the sentence-choice issues of aggravation and mitigation. Counsel explained that they were wary the jury otherwise might rely on evidence of petitioner's history as a reason to believe he personally had committed the murder. J.A. 34-42, 46, 485-486, 490-492, 501-506; see *id.* at 348-351. Ruling under Maryland law, the judge rejected counsels' motion to bifurcate. Counsel then presented a defense that eschewed evidence about the defendant's background and mental health

and instead concentrated primarily on contesting the persuasiveness of the state's proof of "principalship." J.A. 53-56, 70, 319-321, 396-397; see *id.* at 407-408. The jury returned a verdict of death.

On direct review, the Maryland Court of Appeals rejected petitioner's claim that the state's circumstantial evidence had been insufficient to establish petitioner's guilt for the murder. *Wiggins*, 597 A.2d 1329. Later, in state post-conviction proceedings, petitioner claimed that his lawyers at the sentencing hearing had rendered "ineffective assistance" under *Strickland v. Washington* by failing to conduct a more extensive "mitigation" investigation into petitioner's personal history and by relying on the "principalship" defense to the exclusion of evidence about petitioner's deprived background. *Wiggins v. State*, 724 A.2d 1, 15-18 (Md. 1999). But both the trial court and the Maryland Court of Appeals concluded that counsels' performance in this regard had comported with Sixth Amendment standards. *Id.* at 3, 15-18; App. to Cert. Pet. 132a-156a.

A federal habeas corpus judge later disagreed. He found the state's guilt-phase evidence insufficient to support petitioner's conviction for murder. And he further found that counsel had rendered "ineffective assistance" at the penalty trial in that they had failed to conduct a sufficient "mitigation" investigation so that their decision to instead present a "principalship" defense was uninformed. *Wiggins v. Corcoran*, 164 F.Supp.2d 538, 556-560 (D. Md. 2001).

The Fourth Circuit Court of Appeals reversed the district court's grant of habeas corpus relief. Applying the rule for habeas corpus review set out in 28 U.S.C. § 2254(d), the Fourth Circuit determined that the Maryland appellate court's adjudications—of the insufficient-evidence claim under this Court's precedent of *Jackson v. Virginia* and its adjudication of the ineffective-counsel claim under *Strickland*—were at

least "minimally consistent" with the law and the facts and therefore could not be condemned as either "contrary to" or an "unreasonable application of" federal law as "clearly established" by this Court's cases. *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002).

Petitioner sought a writ of certiorari on both the *Jackson* issue of evidentiary sufficiency and *Strickland* issue of effective counsel. This Court granted certiorari only on the ineffective-counsel claim.

SUMMARY OF ARGUMENT

Two fundamental rules of deferential judicial review—the rule of *Strickland v. Washington* governing direct appellate review of the effectiveness of defense counsel's performance in a criminal trial, and the res judicata rule of 28 U.S.C. § 2254(d) limiting the federal habeas corpus court's power to revisit claims adjudicated in state criminal proceedings—separately and in combination require denial of the writ of habeas corpus in this case. Petitioner's challenge to his lawyers' investigation and choice of defense strategy at the sentencing phase of his capital trial fails on the merits under *Strickland* because his lawyers undertook a reasonably sufficient investigation uncovering "mitigating" evidence in petitioner's background before making a hard strategic choice—one any reasonable lawyer might have made—to present instead a different defense that might have been undermined by the alleged "mitigation."

In any event, under Section 2254(d), petitioner's claim ultimately must fail in a federal habeas court for two further reasons. One, the Maryland courts indeed evaluated the evidence under this Court's *Strickland* rule, which does not ever require a perfect or complete "mitigation" investigation in a capital case, and which allows a lawyer to make a reasonable decision to forgo a particular investigation

anyway. As experience in the Ninth Circuit shows, the notion that such mitigation always must be investigated and presented leads to unrealistic and absurd results.

Two, the state courts' "application" of *Strickland* to the facts cannot be deemed "objectively unreasonable" in light of evidence that counsel made an actual strategic choice, and one that any reasonable lawyer might have made, to present a different potentially-meritorious defense. Further, counsel undertook some investigation into predictable areas of potential mitigation in the defendant's personal background, and federal courts may not re-weigh the evidence in reviewing the state-court's ruling for mere reasonableness.

1. In *Strickland v. Washington*, this Court adopted a deferential rule of judicial review for Sixth Amendment challenges to the strategic litigation choices that lawyers must make in defending the accused in criminal cases. Because "there are countless ways to provide effective assistance in any given case," the *Strickland* rule accords broad latitude to defense lawyers carrying out their difficult obligations, and it discourages both the "second-guessing" of counsel's performance and the "*proliferation* of ineffectiveness challenges" itself. *Strickland*, at 690 (emphasis added). In particular, *Strickland* approves "less than complete" investigations of the facts, in contrast to "thorough" ones, if reasonably justified in counsel's professional opinion. 466 U.S. at 690-691. *Strickland* goes no further than establishing that "counsel has a duty to make *reasonable investigations* or to make *a reasonable decision that makes particular investigations unnecessary*." *Id.* (emphasis added).

Although petitioner accuses the state court of directly flouting this Court's Sixth Amendment precedents, it is petitioner whose arguments conflict with *Strickland* and its progeny. Petitioner would require, contrary to *Strickland's* deferential rule of reasonableness, the adoption of rigid constitutional regulations that in effect would require defense

counsel to undertake, in every capital case and regardless of the circumstances, a perfect and complete investigation that uncovers all available potentially mitigating evidence in the defendant's personal background. Contrary to *Strickland*, petitioner would deny to counsel the exercise of professional judgment to abort such an investigation or forgo such evidence in favor of a different strategy that appears more promising or in order to better allocate limited resources in defending his client.

Through a series of Ninth Circuit opinions that depart from *Strickland*, amici States can report that they have seen the future of the rigid approach here urged on this Court by petitioner—and it doesn't work. On the unsound hypothesis that all mitigating evidence always must be unearthed for presentation to the sentencer, and with disregard for the practical expertise of working lawyers, the Ninth Circuit has erroneously condemned as incompetent dedicated defense attorneys whose continued participation in the criminal justice system is indispensable. For example, under the mechanical rules and hindsight judicial review endorsed by those opinions, and by arguments like petitioner's, lawyers have been deemed incompetent for failing to present mental-state opinion testimony developed in the years following the finality of the defendant's conviction, even though experts consulted by defense counsel prior to trial had offered no such opinions at the time. Attorneys have been condemned for failing to produce evidence of their client's personal experiences, even where their client would not cooperate in the enterprise, and even where such evidence threatened to undermine other lines of the penalty-phase defense. They have been castigated, in hindsight, for persisting in a penalty-phase defense consistent with the defense presented at the guilt-phase; and, conversely, they have been condemned for declining to adhere, at the penalty phase, to a line of defense that the jury rejected at the guilt phase. Petitioner's

arguments would perpetrate a similar injustice on defense counsel in this case.

2. Even if a federal habeas court reasonably might disagree with the result the Maryland courts reached in adjudicating petitioner's ineffective-counsel claim, a second fundamental rule—that of 28 U.S.C. § 2254(d), adopted as part of the AEDPA—still would bar relief in petitioner's case. In Section 2254(d), Congress profoundly reformed federal habeas corpus law by requiring another level of deferential review of a state-court's adjudication of any constitutional claims raised in a criminal case. In categorically precluding relief on such claims even where the state court's decision is wrong—provided that the state court did not directly flout or "unreasonably apply" this Court's "clearly established" precedents—Section 2254(d) ensures that state-court convictions are given effect to the extent possible under law.

Either one of these rules of deferential review, if applied alone, would severely diminish the possibility of federal relief on a claim such as petitioner's. But, where the state court recognizes and applies this Court's clearly established Sixth Amendment law, the synergistic effect of the *Strickland* and Section 2254(d) rules disallows federal habeas corpus relief on a state prisoner's ineffective-counsel claim except in the rarest of cases. The federal court's legitimate role under the modified res judicata rule of Section 2254(d) becomes, as the Fourth Circuit recognized, that of simply assuring that the state court's rejection of the claim under this Court's precedents was "minimally consistent" with the facts and the law. That inquiry is at its narrowest when the underlying claim itself requires the state court to review deferentially the performance of counsel. Any greater role poses a demonstrable risk that a grant of federal habeas corpus relief will be ill-founded, either upon improper second-guessing of counsel in violation of *Strickland*, or the federal court's mere

substitution of its own judgment for that of the state court in violation of Section 2254(d).

3. In this case, the Fourth Circuit accurately determined that the state court's adjudication of petitioner's *Strickland* claim was at least "minimally consistent" with the facts and the law. Evidence before the state court indicated that counsel had made a conscious, strategic choice—based upon their evaluation of the merits—to present a defense of "no principalship." That defense was at least potentially meritorious under the law and on the facts; and no one can plausibly claim that presentation of the petitioner's "social history" conclusively would have succeeded instead. Moreover, presentation of evidence of hardship or mental problems in petitioner's background conceivably might have undermined the force of that defense in the minds of a jury. In any event, counsel in fact undertook some inquiry—and here a substantial one—into mitigating evidence in petitioner's background and personal circumstances. In short, there was more than a minimal rational basis in the evidence for the state court's rejection of petitioner's challenge to his lawyers' performance. A grant of relief under the guise of "objective reasonableness" review necessarily would proceed from impermissible second-guessing and re-weighing of evidence in violation of Congress' plan.

ARGUMENT

THE STATE COURT'S RULING ON THE *STRICKLAND* CLAIM IS CONCLUSIVE UNDER 28 U.S.C. § 2254 BECAUSE THE RECORD CONTAINED EVIDENCE THAT COUNSEL HAD MADE A STRATEGIC DECISION TO PRESENT A POTENTIALLY-MERITORIOUS DEFENSE THAT LOGICALLY MIGHT HAVE BEEN IMPAIRED BY EVIDENCE OF PETITIONER'S BACKGROUND

The fundamental legal principles that control petitioner's case are contained in *Strickland v. Washington*, 466 U.S. 668 (1984), which set the standard for the Maryland courts' judicial review of the claim of ineffective counsel, and 28 U.S.C. § 2254(d), which sets the standard for later federal habeas corpus review of the state courts' ruling. The essential characteristic of each of these standards is deference, first to the defense lawyer and then to the state court. In a federal habeas corpus case involving a fact-specific ineffective-counsel claim, already rejected on its merits by the state courts, the combination of the standards leaves only the narrowest grounds for yet another round of review.

On the "performance" prong of the *Strickland* test, requiring "reasonable competence" under prevailing professional norms, 466 U.S. at 688, this Court must reject petitioner's extravagant claim that counsel in capital cases are, in effect, required to conduct a perfect investigation unearthing all available evidence about the defendant's personal background before making any strategic choice to present a different penalty defense instead. Nothing in this Court's cases supports, let alone "clearly establishes," such a rigid and unworkable rule in evaluating the performance of counsel. Because the Maryland courts in petitioner's state

case analyzed the evidence under this Court's *Strickland* rule, which does not impose on counsel the unrealistic duty described by petitioner, its ruling cannot be condemned as "contrary to" this Court's clear holdings.

Petitioner's related argument, that the Maryland Court of Appeals in any event applied the *Strickland* rule to the facts in an "objectively unreasonable" way, also must fail. Given evidence that counsel made a conscious and rational strategic choice to forgo mitigating evidence in petitioner's history—and, indeed, that they had done so after actually inquiring into areas of such mitigation—there is no room for any conclusion that the Maryland court's adjudication of the merits of petitioner's claim was an "unreasonable application of" this Court's Sixth Amendment law. To the contrary, this Court has validated similar, and arguably lesser, performances by capital defense counsel at sentencing. E.g., *Burger v. Kemp*, 483 U.S. 776 (1987); *Strickland*, 466 U.S. 668; see, e.g., *Darden v. Wainwright*, 477 U.S. 168, 184-186 (1986).

A. Neither *Strickland* nor Section 2254(d) allows relief on a claim that lawyers are incompetent simply because they did not completely investigate all mitigating evidence in a defendant's background, or because they chose an alternative defense that eschewed such mitigation at the sentencing hearing.

1. Petitioner argues that the Maryland Court of Appeals' rejection of his ineffective counsel claim was "contrary to" this Court's "clearly established" jurisprudence. (Pet. Br. 16, 20.) But the state court explicitly acknowledged that "the standard to be applied . . . is that enunciated in *Strickland v. Washington*." *Wiggins v. State*, 724 A.2d at 12. And, in ultimately rejecting petitioner's challenge under *Strickland's* "performance prong," the Maryland court again explained that petitioner's argument "runs afoul of the principle set forth in

Strickland." *Id.* at 17. For this reason, petitioner's argument must fail. *Early v. Packer*, 123 S.Ct. 362, 364-366, No. 01-1765 (Nov. 4, 2002)(per curiam).

2. Petitioner and various amicus briefs necessarily argue, whether explicitly or not, that this Court's "clearly established" Sixth Amendment jurisprudence requires defense counsel in every capital case to complete successfully an exhaustive investigation uncovering all available evidence of potentially-mitigating evidence in the defendant's personal background. (Pet. Br. 17 (character evidence "generally required"), 18 (courts may not defer to tactical choices if counsel unaware of available mitigation), 21-22 (constitutional penalty-phase standards require presentation evidence of defendant's character and record), 24 (lawyer required to collect as much information "as possible"), 26 (lawyer must "explore all avenues leading to the facts"), 27 (investigation should seek "all reasonably available mitigating evidence"), 29-32 (counsel in no position to make strategic choice if ignorant of mitigating evidence); ABA Br. 3-4, 13-21 (listing numerous elements of a "complete" investigation, including the hiring of experts).) If not clear enough from the text of these briefs, the inescapable logic of their arguments nevertheless leads directly to two untenable propositions. *First*: the defendant is entitled to a perfect investigation that unearths all available mitigating evidence. *Second*: if any such evidence remains undiscovered, the court must discredit as "uninformed" a strategic decision of defense counsel to forgo such mitigation in favor of a defense that appears, in light of counsel's professional expertise, more likely to succeed.

Petitioner suggests no principled method of distinguishing a complete and perfect investigative effort from a "reasonable" one. The radical scope of petitioner's argument appears especially stark in his apparent insistence that counsel may not be credited with an informed strategic

decision to forgo such mitigation evidence if there remained available any undiscovered evidence along those lines. (Pet. Br. 29-32.) The obvious import of petitioner's argument is that counsel may never stop investigating in any area that might provide evidence more promising than evidence already known to him.

In the view of amici States, it is imperative that this Court soundly reject any interpretation of *Strickland* that would lend support to either of those unrealistic and unworkable propositions. The threat that they would pose to *Strickland's* policies—of deferential review of counsel's performance for simple reasonableness and the avoidance of a proliferation of bitterly intrusive hindsight challenges to the performance of lawyers whose energetic participation in the defending capital cases is indispensable—is hardly an imaginary one. Despite *Strickland's* quite different aim, 466 U.S. at 689-690, challenges to the competence of counsel have indeed "proliferated," and it is now all but inevitable that a habeas corpus petition in a capital case will contain multiple attacks on trial counsel's performance. See Price Waterhouse Cooper, COST OF PRIVATE PANEL REPRESENTATION IN FEDERAL CAPITAL HABEAS CORPUS CASES FROM 1992 TO 1998, p. xvii (80 per cent of cases). Given the money made available in state courts and in lower federal courts, *id.*, at pp. vi-viii, V40-43, V70-76, VIII-119 (average fees of $130,000 to prepare federal capital petition)[1/], and the often glacial pace of federal capital habeas corpus in some Circuits, the petitioner will always be able to produce previously undiscovered evidence of alleged mitigating circumstances.

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1. In a recent proceeding in the Central District of California, the district judge stated that the average costs for petitioner's counsel in a capital habeas corpus case in the judge's court ranged from 1.5 to 2 million dollars, and that the cases spanned eight to ten years. *Pinholster v. Calderon*, No. CV-95-6240-GLT, Rep. Tr. 30 (Sept. 11, 2002).

See *Karis v. Calderon*, 283 F.3d 1117, 1142 (9th Cir. 2002) (diss. op.).

3. In this atmosphere, it is ominous indeed that one federal circuit has issued opinions flatly stating that "*all* relevant mitigation information *must be unearthed for consideration* at the capital sentencing phase." *Caro v. Calderon*, 280 F.3d 1247, 1257 (9th Cir.) (emphasis added), cert. denied, 122 S.Ct. 2645 (2002); accord, *Turner v. Calderon*, 281 F.3d 851, 891 (9th Cir. 2002). Under such a rule, as experience in that circuit portends, an attorney will be deemed incompetent for failing to present expert mental-impairment testimony even if two experts examine the defendant before trial and find no impairments and the defendant refuses to cooperate in any further examinations. *Douglas v. Woodford*, 316 F.3d 1079, 1085-1086 (9th Cir. 2003). Similarly, an attorney will be held incompetent for failing to investigate the defendant's mental health, even if four experts examine the defendant and none indicates that he was suffering from insanity or diminished capacity. *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.), cert. denied, 527 U.S. 1049 (1999). The same fate will befall the lawyer who forgoes investigating other lines of defense after his client claims alibi. *Phillips v. Woodford*, 267 F.3d 966, 972-980 (9th Cir. 2001). The same will await the lawyer who, to encourage trust, refrains from investigating mitigation in the defendant's background after his client threatens to sabotage the defense to prevent questioning of his parents. *Silva v. Woodford*, 279 F.3d 825, 837-840 (9th Cir.), cert. denied, 123 S.Ct. 342 (2002); see *Douglas*, at 1086 (counsel should have investigated childhood even though petitioner would not reveal names of witnesses); *Karis*, 283 F.3d at 1135, 1140-1141; *id.* at 1142 (diss. op.) (counsel must present evidence of abusive childhood).

Petitioner's proffered rule unreasonably would condemn the lawyer who presents guilt-phase testimony from a psychiatrist about the effects of PCP on the defendant's mens rea but then, after the jury finds the defendant nevertheless premeditated and deliberated the specific intent to kill, "fails" to produce the same psychiatrist for further penalty-phase testimony about the drug's effect on the defendant's ability to think at the time of the crime. *Jackson v. Calderon*, 211 F.3d 1148, 1163 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001); cf. *Wade v. Calderon*, 29 F.3d 1312, 1324 (9th Cir. 1994), *id.* at 1324 (conc. and diss. op.) (criticizing counsel for persisting with a penalty-phase line of defense that had proved unsuccessful at the guilt phase). It would tar as incompetent the lawyer who presents mitigating testimony about the defendant's good qualities from an apparently kindly mother who might engender jury sympathy, and would require counsel instead to undermine those portrayals with evidence that the defendant's misbehavior had repeatedly prompted the mother to discipline him roughly. *Jackson*, at 1164 (maj. op.), 1167 (diss. op.); see *Rios v. Rocha*, 299 F.3d 796, 805-807 (9th Cir. 2002) (counsel held incompetent for presenting mental-state rather than misidentification defense after reviewing police report, speaking to an eyewitness, and reviewing a psychological report about the defendant). And it would do the same to the lawyer who fails to identify "all" evidence his medical consultants might adjudge "relevant" to their expert diagnosis—even though a lawyer properly hires medical consultants precisely for their expertise in making such judgments themselves. *Bloom v. Calderon*, 132 F.3d 1267, 1277 (9th Cir. 1997), cert. denied, 523 U.S. 1145 (1998); see *Lord v. Wood*, 184 F.3d 1083, 1095 (9th Cir.) (faulting counsel for not "personally" interviewing witnesses), cert. denied, 528 U.S. 1198 (2000); see also *Gentry v. Roe*, 300 F.3d 1007, 1013-1014 (9th Cir. 2002) (deeming components of closing argument ineffective).

Although this Court denied certiorari on various issues presented in many of these cases, together they now have reached a stage of critical mass on the *Strickland* question. As recently recognized by the Ninth Circuit's Judge Kleinfeld, there is

> a developing body of circuit law substituting our judgment on defense tactics and presentation for the judgment of defense counsel and of state courts. . . . The last thing criminal defendants and the public need is a Ninth Circuit "form book" of approved arguments and strategies, yet that's what we're giving them.

Gentry v. Roe, ___ F.3d ___, 2003 WL 192085, No. 00-55691 (9th Cir. Jan. 28, 2003) (op. dissenting from denial of en banc review). Plainly, amici States are hardly exaggerating, or attacking a straw man, in alerting this Court to the risk of adopting petitioner's extreme theory of "reasonable competence."

4. Nothing in *Strickland* supports petitioner's extravagant interpretation of counsel's duties. This Court's cases decline to impose "mechanical rules" on lawyers, *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000); *Strickland*, 466 U.S. at 688-689, 696; they recognize instead that "there are countless ways to provide effective assistance in any given case," *Strickland*, at 688. Petitioner's and some amici's many citations to norms of performance promulgated by academics, bar associations, and members of the defense bar do not support the use they seek to make of them. Petitioner selectively quotes from *Strickland*, mentioning this Court's acknowledgment that such norms "are guides to determining what is reasonable." (Pet. Br. 26.) He leaves out *Strickland's* immediate qualification: ". . . but they are only guides." 466 U.S. at 688. As *Strickland* further explained, "the existence of detailed guidelines for representation could distract counsel

from the overriding mission of vigorous advocacy of the defendant's cause." *Id.* *Strickland* nowhere guarantees the "best" legal representation, or even aims to improve the quality of lawyering as bar-association norms obviously are intended to do. *Id.* at 680. Instead, *Strickland* clearly establishes that,

> strategic choices made after thorough investigation of law and facts relevant to plausible outcomes are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make *reasonable investigations or* to make *a reasonable decision that makes particular investigations unnecessary.*

466 U.S. at 691 (emphasis added). Thus, in *Strickland*, this Court approved defense counsel's reasonable "surmise," based on conversations with the defendant and the defendant's mother, that it likely would not be helpful to seek a psychiatric opinion or evidence from other witnesses and that the defense instead should rely, at the capital sentencing hearing, simply on the defendant's brief statement to the judge during an earlier guilty-plea colloquy.

Nor does the Sixth Amendment require, or even prefer, the actual presentation of evidence of the defendant's personal history. Petitioner strongly implies that it does, for he argues that, even if his lawyer's investigation of personal-background mitigation were complete, counsel in the case at bar still could not reasonably decide to forgo it in favor of the "principalship"-based defense. (Pet. Br. 37 et seq.) To say the law demands a full "mitigation" investigation even where a different and complete defense to death-eligibility is available, however, is to incorrectly assume that courts later

on will be in position to confidently judge that the lawyer should have chosen the one line of defense over the other. Such judicial review could only occur with hindsight, or by adherence to a rule that there is only "one way" to defend an accused, and that is what *Strickland* prohibits. 466 U.S. at 669. Sixth Amendment principles do not support any requirement or preference for the presentation of personal-background evidence. Thus, in *Burger v. Kemp*, 483 U.S. 776, this Court was accepted counsel's judgment that evidence of an unstable childhood, in which the defendant saw one parent beaten and learned to use drugs from the other, would not help minimize the possibility of a death verdict.

5. Petitioner says that, in *Williams v. Taylor*, 529 U.S. 362 (2000), this Court "clearly established" rules requiring full investigation and/or presentation of mitigating personal- or social-history evidence. (Pet. Br. 20-21 et seq.) But, even if this Court had done so, it would be of no use to petitioner. *Williams* was decided well after the Maryland court adjudicated petitioner's ineffective-counsel claim. It therefore cannot logically be maintained that the state court's ruling "was," under Section 2254(d), contrary to a rule that had not even been announced, let alone "clearly established," at the time.

More important, *Williams* did not hold, or "clearly establish," that the Constitution compels the extensive mechanical investigation regulations proffered by petitioner and some of the amicus briefs. In *Williams*, counsel had completely failed to investigate any potential mitigation in the defendant's personal history. And—although amici believe that the implication requires further examination, see pp. 24-25, *post*—the *Williams* Court's judgment about the defense investigation seemed to be affected significantly by the fact that counsel largely had failed even to make conscious strategic choices, on the relative merits of the potential

available defenses, to forgo potential evidence of his client's abusive childhood in favor of a different defense strategy. 529 U.S. at 395. Moreover, the Virginia Supreme Court simply assumed that counsel's efforts failed *Strickland's* "performance prong"; and, in the appeal in this Court, the State "barely disputed" that assumption. 529 U.S. at 371, 395. It is true that *Williams* indeed stated that counsel in that case had failed in his obligation to conduct a "thorough" investigation. *Id.* at 395. But, in the context of such extreme facts and the diminished level of adversarial contest, *Williams* should not be interpreted as changing sub silentio the limited, clearly-established *Strickland* rule that "counsel has a duty to make *reasonable* investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" 466 U.S. at 391 (emphasis added).

Strickland and its progeny do not support petitioner's extravagant interpretation of counsel's duty and the inevitable risk such an interpretation poses. Despite petitioner's argument to the contrary, then, the Maryland courts' rejection of the ineffective-counsel claim in this case was not "contrary to" *Strickland* or this Court's clearly-established law.

B. *Strickland* and Section 2254(d) combine to provide maximum deference, in federal habeas corpus proceeding, to a state court's application of clearly established Sixth Amendment law to the unique facts surrounding defense counsel's investigation and strategic choices in a criminal case.

Petitioner further argues that, even if not strictly "contrary to" the extreme and rigid rules he incorrectly discerns in the *Strickland* line of cases, the Maryland courts' rejection of his ineffective-counsel claim nevertheless represented an "objectively unreasonable application" of the general *Strickland* standard requiring reasonably competent

performance. (Pet. Br. 16, 28.) But federal habeas corpus review in this area—requiring deferential reasonableness review of a state court decision itself predicated upon deferential reasonableness review of counsel's performance in the context of a unique array of facts—is extremely narrow and cannot support a grant of relief in this case.

1. Under *Strickland*, the defendant bears the burden of overcoming a "strong presumption" that, under the circumstances, "the challenged action '*might* be considered sound trial strategy.'" 466 U.S. at 689 (emphasis added). The state court must determine whether "the identified acts or omissions were *outside the wide range* of professionally competent assistance." *Id.* (emphasis added). Counsel may not be condemned for a "decision about which competent lawyers *might* disagree." *Bell v. Cone*, 122 S.Ct. 1843, 1854 (2002) (emphasis added). Because "there are countless ways to provide effective assistance in any given case," *Strickland* accords the broadest latitude to defense lawyers in meeting their difficult obligations, and aims to discourage both hindsight "second-guessing" of counsel's performance and the "proliferation" of ineffectiveness challenges. *Strickland*, at 689-690.

2. Section 2254(d), also a deferential standard, prohibits federal habeas corpus relief on claims already "adjudicated on the merits" in state court. It provides only narrow exceptions where the state court decides the case "contrary to," i.e., directly opposed to, a binding precedent of this Court, or where the state court otherwise applies a clearly established general rule of law to the individual facts of a case and reaches a result that is not just incorrect but also "objectively unreasonable." *Williams v. Taylor*, 529 U.S. at 404-410. Section 2254(d) thus serves as another layer insulating state-court judgments; it "ensure[s] that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 122 S.Ct. at 1849.

3. Real effect, obviously, must be given both to *Strickland* and to Section 2254(d) in this case. When promulgating the *Strickland* standard in 1984, this Court determined that, as a matter of habeas corpus jurisprudence, "no special standards ought to apply to ineffectiveness claims made in habeas proceedings." 466 U.S. at 697-698. But Congress changed that in 1996. In the AEDPA, it amended the basic habeas corpus statute, 28 U.S.C. § 2254, to provide a special deferential standard for all claims—ineffectiveness claims among them—adjudicated on the merits in the state courts. Now, the multi-level deferential standards contained in *Strickland* and in Section 2254(d) operate together in a case such as petitioner's. Not only must a state court review counsel's performance deferentially under *Strickland*, but the further deferential standard of Section 2254(d) "leaves *primary responsibility* with the state courts for these judgments." *Woodford v. Visciotti*, 123 S.Ct. 357, 361, No. 02-137 (Nov. 4, 2002) (per curiam).

Absent an affirmative showing that the state court did not conscientiously apply the "correct" deferential *Strickland* standard to the myriad facts in an individual case, the combination of *Strickland* and the deferential Section 2254(d) standards logically leaves only the narrowest ground upon which a federal habeas court may conclude that the state court's ruling was not merely wrong but "objectively unreasonable." In the case at bar, the Fourth Circuit's analysis reflects that, in this respect, federal habeas corpus review for "objective unreasonableness" in a state court's actual application of the deferential, fact-specific *Strickland* inquiry resembles the minimal judicial scrutiny of the sufficiency of evidence to support a guilty verdict prescribed by *Jackson v. Virginia*, 443 U.S. 307 (1979). On direct appeal, review simply tests whether any rational juror could have found the defendant guilty under the operative legal standard and on the evidence presented. *Id.* Appellate courts

rarely reject, on sufficiency grounds, jury fact-findings and jury determinations of trial questions on issues such as the elements of the crime and the reasonableness of a defendant's belief in the need for self-defense. In further habeas corpus proceedings under Section 2254(d), review logically should be even more deferential. See *Gomez v. Azevedo*, 106 F.3d 192, 197 (7th Cir. 1997), vacated and remanded, *Gomez v. Teller*, 522 U.S. 801 (1997); compare *Jackson* (post-*Winship* rule of review) with *Thompson v. Louisville*, 362 U.S. 199 (1960) (pre-*Winship* rule requiring only "some" evidence). Section 2254(d) review of a *Strickland* claim should involve a similar kind of deference with similar kinds of results.

Federal habeas courts under Section 2254(d) should limit their review of a *Strickland* claim to the question of whether the record provided even the most minimal support for the state court's ruling. In limiting their review, they also must take care to focus separately upon the question of whether the record provided minimal conceivable support for the challenged ruling, rather than on the question of whether counsel's performance violated *Strickland*. They may not slap an "objectively unreasonable" label on the state court's ruling whenever they disagree with it. Nor should they allow it to appear that they have done so.

The problem of courts paying mere "lip service" to Section 2254(d) is real enough. See *Gentry v. Roe*, *supra*, 300 F.3d at 1014 (diss. op.); *id.*, 2003 WL 192085 (diss. op.). As this Court has made clear, Section 2254(d) allows habeas corpus relief when the state-court adjudication is "objectively unreasonable"—not where the federal court simply thinks it is "wrong." *Woodford v. Visciotti*, 123 S.Ct. 357, 361 (2002); *Bell v. Cone*, 122 S.Ct. at 1852. But, in purporting to apply Section 2254(d), federal courts persist in granting relief based upon the strength of their own belief that the state court erred, without first inquiring whether an objective basis nevertheless supported the state court's ruling. See *Van Tran v. Lindsey*,

212 F.3d 1143, 1153 (9th Cir.), cert. denied, 531 U.S. 944 (2000). And, certainly, some courts reject state court adjudications under Section 2254(d) without any attempt to explain why the state court ruling was objectively unreasonable under this Court's precedents and not merely "wrong." E.g., *Bradley v. Duncan*, 315 F.3d 1091, 1100-1101 (9th Cir. 2002); *Gentry v. Roe*, 300 F.3d at 1013-1014. Absent clear methodological restraints on federal court review, the current state of affairs—one in which intrusive federal challenges on ineffective-counsel claims occur in virtually *every* capital case and many non-capital cases, with oscillating decisions upholding and denying relief common at each new stage of judicial review—will remain a testament to federal-court failures in carrying out Congress' goal in Section 2254(d) and this Court's goals in *Strickland*.

Petitioner's challenge to the state court's "application" of clearly established law to the specific facts of his case would perpetuate such failures. Barely even paying "lip service" to the habeas corpus statute, his brief relegates to the status of mere afterthought the dramatic change in federal habeas corpus review wrought by Congress' enactment of Section 2254(d). In petitioner's telling of it, the conclusion that the state court's ruling was "objectively unreasonable" under this Court's ineffective-counsel precedents follows automatically from his argument that the state court ruling was "incorrect." No further explanation is offered.

Here, in contrast, the Fourth Circuit asked whether, for Section 2254(d) purposes, the Maryland court's adjudication of petitioner's twin sufficiency-of-evidence and ineffective-counsel claims was at least "minimally consistent" with the law and the facts. See *Wiggins*, 288 F.3d at 637. On such fact-specific claims, which themselves require initial judicial deference to the decision-maker, "minimal consistency" at most requires merely some evidence in the record that

rationally might provide any support for the state court's determination of counsel's reasonableness.

C. Because counsel presented a potentially-meritorious complete defense of "principalship," and in any event because there was evidence that counsel conducted some investigation into mitigation beforehand, federal habeas corpus relief would amount to mere re-weighing of the evidence and second-guessing of the state court in violation of Section 2254(d).

Given the evidentiary record in the state court, and the state court's application of the correct *Strickland* standard to that evidence, there is no room for federal habeas corpus relief under Section 2254(d).

1. Here, defense counsel presented a "principalship" defense that did not depend upon social- or personal-history evidence. That defense was potentially meritorious: the prosecution was required to prove principalship beyond a reasonable doubt, petitioner's lawyers at many stages of the state and federal proceedings have disputed the legal sufficiency of the prosecution's proof, one federal judge concluded that the evidence had been insufficient, and counsel pointed to fingerprint evidence as suggesting that other culprits had been in the victim's apartment. Indeed, the "principalship" defense predictably might have caused some jurors to doubt that petitioner had been involved in the murder even as an accomplice. S. Garvey, "Aggravation and Mitigation in Capital Cases: What Do Jurors Think?" 98 COL. L. REV. 1538, 1563 (Oct. 1998) (survey reporting that "[r]esidual doubt over the defendant's guilt is the most powerful 'mitigating' fact"); see *Traver v. Hooper*, 169 F.3d 710, 715 (11th Cir. 1999) (collecting authorities recognizing cogency of lingering doubt); compare *Julius v. Johnson*, 840 F.2d 1533, 1542 (11th Cir. 1988) (rejecting defendant's

challenge to effectiveness of lingering-doubt argument) with *Hamilton v. Vasquez*, 17 F.3d 1149, 1164 (9th Cir. 1994) (defendant challenges *failure* to argue lingering doubt). Certainly, a reasonable lawyer might have made the same choice made by petitioner's counsel.

Presentation of the details of "mitigating" hardships and/or mental-health opinion conceivably might have impaired the "principalship" defense by providing the jury with reasons why petitioner might have developed into the kind of man who personally could commit a homicide—or by posing the risk that the jurors would conclude, logically or not, that the defense was dishonestly or inconsistently seeking both to deny and to explain the killing. See W. White, "Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care," 1993 U. ILL. L. REV. 323, 356 (emphasizing need for consistent guilt- and penalty-phase defenses). Conversely, no one plausibly could argue that evidence of personal-background mitigation, either that known to counsel or the further information inevitably developed over time in the post-conviction investigations, conclusively would have succeeded while a "principalship" defense could not.

In amici's view, the federal court under Section 2254(d) need look no further into the record to discern that the state court's adjudication of petitioner's claim under the proper *Strickland* standard was not "objectively unreasonable." This Court's clearly-established law, as explained above, allows counsel "to make reasonable investigations *or to make a reasonable decision that makes particular investigations unnecessary.*" *Strickland*, 466 U.S. at 691 (emphasis added). Under Section 2254(d), Congress left to the Maryland courts the primary and initial obligation to faithfully apply this Court's clearly established law to the particular facts of petitioner's case. *Visciotti*, at 361. Given the potential merit of the "principalship" defense and the conceivable risk

attendant to omitting or diluting it in favor of presenting background mitigation evidence, there was a rational basis for the state court to adhere to *Strickland's* presumption that counsel's challenged conduct "*might* be considered sound trial strategy" and was not shown to be "outside the range of professionally competent assistance." See 466 U.S. at 689-690 (emphasis added).

2. Of course, as Maryland shows in its brief, there was much stronger evidence supporting not only the objective reasonableness but the correctness of the decision rendered in the state courts. Petitioner's defense lawyers had conducted a substantial, indeed ample, investigation into predictable areas of potential mitigation in the defendant's personal background; and they uncovered evidence that petitioner might have suffered hardships: painful parental discipline, foster home placement, sexual victimization, and expert opinion as to some level of petitioner's mental-health problems. In addition, counsel in fact exercised reasoned professional judgment in choosing to concentrate on "principalship" rather than risk impairing that complete defense with evidence of petitioner's personal background. information. Indeed, they sought to modify the trial procedures to allow sequential presentation of background evidence if the jury first actually found "principalship."

3. Although the "objective reasonableness" of the state court's rejection of the *Strickland* claim is clearly enhanced by evidence of a substantial investigation and a subjective strategic choice on the relative merits of different penalty-phase lines of defense, such evidence is not invariably necessary in order to validate counsel's performance, at least not in the unique context of a combined *Strickland*-Section 2254(d) habeas corpus case. The state court here might have concluded, that under the then-"prevailing professional norm" and local circumstances in Baltimore County in1988, that a reasonable lawyer might have chosen to pursue the complete

"principalship" defense over an inherently uncertain defense based upon details of the defendant's background regardless of what details ever might emerge even in a "complete" social-history investigation. Resolution of those fact-specific questions, again, is left primarily to the state courts, not the federal habeas corpus courts, under *Strickland* and Section 2254(d). *Bell*, at 361.

Similarly, although review of the precise subjective thought process of trial counsel might well prove helpful to a court seeking to identify possible justifications for the challenged performance and in providing an extra measure of assurance in the accuracy of the court's judgment in close and doubtful cases, such proof is not always needed and should not be misused as a means of "grading" counsel's work. *Strickland* presumes that counsel's decisions are reasonably justified by tactics and strategy; and it imposes an "objective" standard of reasonableness under "prevailing professional norms" to determine whether the challenged conduct was "outside the range of professionally competent assistance." 466 U.S. at 688, 690. Mere incantation of the words "tactics" and "strategy" will not save a manifestly unreasonable performance. But neither should actual presentation of a defense obviously within the range of reasonable performance be condemned simply because of perceived inadequacy in the nature or quality of the lawyer's subjective thought processes. Amici States doubt that it would further the goals of the Sixth Amendment, as enunciated in *Strickland,* to invalidate a conviction because defense counsel gave insufficient thought to the matter before fully presenting a defense that a reasonable lawyer would have presented anyway.

Here, for example, the district judge indicated that counsels' decision must be rejected as ill-informed, regardless of whether a reasonable lawyer in all the circumstances might have reached the same decision and chosen the same line of defense anyway. *Wiggins v. Corcoran*, 164 F.Supp. at 560;

see *Hendricks v. Vasquez*, 974 F.2d 1099, 1109 (9th Cir. 1992) (ordering evidentiary hearing to ascertain counsel's actual reasons); cf. *Mak v. Blodgett*, 970 F.2d 614, 618 (9th Cir. 1992); *Hall v. Luebbers*, 296 F.3d 685, 697 (8th Cir. 2002). The inquiry, instead, should be an objective one, focusing on whether a reasonable lawyer under all the circumstances could have presented the same case as the challenged lawyer ultimately did. *Bell v. Cone*, 122 S.Ct. at 1853 (question is whether counsel made a decision "about which competent lawyers might disagree"); *Strickland*, at 690 (question is whether, "in light of all the circumstances," the challenged conduct was "outside the wide range of professionally competent assistance"); *Crawford v. Head,* 311 F.3d 1287, 1288 (11th Cir. 2002); see *Wiggins v. Corcoran*, 288 F.3d at 642.

4. Insofar as petitioner's argument rests on the extent of the actual mitigation investigation undertaken by counsel, and continued re-weighing of whether it rose to the level of a "reasonable" investigation under *Strickland*, it illustrates precisely what Section 2254(d) review should *not* be. Again, Congress' plan leaves such decisions to the state courts except in cases of the most obvious and egregious error. Given an actual inquiry by counsel and the unearthing of some evidence of a the defendant's background and mental condition, and one of more rounds of state-court *Strickland* review, relief in remote federal proceedings would inherently involve mere re-weighing of the evidence. Little is gained in terms of accuracy—and much is lost in terms of finality and fidelity to Congress' plan in Section 2254(d)—to have unending and oscillating determinations of "reasonableness" based on myriad sets of facts by a succession of judges years after the state courts faithfully applied the proper standard to the evidence in the first place.

5. There was—at the least—some rational evidentiary support for the state court, in applying the deference-to-

counsel *Strickland* rule, to conclude that counsel's decision might be considered to be within the range of professional competence under all the circumstances. Because the state court did not decline to apply the correct *Strickland* rule, and because there was at least some evidence rationally supporting the state court's adjudication under that rule, Section 2254(d) precludes federal habeas corpus relief on petitioner's ineffective-counsel claim.

CONCLUSION

For these reasons, the judgment of the Fourth Circuit should be affirmed.

Dated: February 18, 2003

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IN THE

Supreme Court of the United States

KEVIN WIGGINS,

Petitioner,

vs.

SEWALL SMITH, Warden, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

In *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), this Court held that, in the circumstances of that case, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." The case now before the Court presents the following questions regarding this precedent:

1. Should the above holding of *Burger* be overruled and replaced with a rule requiring an "all-out investigation" in every capital case?

2. Can Question 1 be answered in the affirmative on habeas corpus, given the constraints of *Teague* v. *Lane* and 28 U. S. C. § 2254(d)(1)?

3. Was the Maryland Court of Appeals' application of *Burger* to the facts of this case "unreasonable," within the meaning of 28 U. S. C. § 2254(d)(1)?

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IN THE

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KEVIN WIGGINS,

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Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Effective assistance of counsel is essential to the proper functioning of our adversarial system of justice, and genuine cases of ineffective assistance need to be redressed. However, bogus claims of ineffective assistance are now pandemic in

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

capital litigation. An ineffective assistance claim is now reflexively made in nearly every capital habeas case, regardless of the actual quality of representation. These groundless claims are a major factor in the excessive delay in enforcing capital punishment.

Even worse than delay, however, is the appalling frequency with which bogus claims are actually granted. California effectively has no death penalty because of the Ninth Circuit's practice of granting habeas relief to capital defendants who were, in fact, well represented.

Congress took strong action to correct this abuse by enacting the Antiterrorism and Effective Death Penalty Act of 1996, specifically in 28 U. S. C. § 2254(d)(1). However, that landmark reform is being routinely ignored. In *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 123 S. Ct. 357 (2002), the Ninth Circuit's disregard of the statute was so blatant as to warrant unanimous summary reversal by this Court, but a great many other such cases go uncorrected.

The present case is one in which the state court faithfully applied this Court's precedents, and the federal court correctly respected the state court's "primary responsibility . . . for these judgments." *Id.*, 154 L. Ed. 2d, at 288, 123 S. Ct., at 361. To accept the petitioner's position, this Court would have to change the standard on what is effective assistance, repudiate its holding in *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), and do so retroactively *twelve years* after the case became "final" on direct appeal.

The effective death penalty that Congress sought to achieve can only be achieved if the law is reasonably stable. "Annually improvised . . . jurisprudence," see *Morgan* v. *Illinois*, 504 U. S. 719, 751 (1992) (Scalia, J., dissenting), renders impossible a fair, consistent, and effective system of punishing the worst murderers.

The dramatic, retroactive change in the standard for judging effective assistance which petitioner and supporting *amici* seek

in this case would be detrimental to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On September 17, 1988, 77-year-old Florence Lacs was found dead in the bathtub of her apartment. *Wiggins* v. *State*, 324 Md. 551, 557, 597 A. 2d 1359, 1361 (1991) (*Wiggins I*). She had been drowned. *Id.*, at 559, 597 A. 2d, at 1363. Mrs. Lacs was lying on her side, half covered with cloudy water, wearing no underpants and her skirt hiked up to her waist. *Id.*, at 557, 597 A. 2d, at 1361. Her apartment was partially ransacked, but there was no evidence of a forced entry. *Id.*, at 557-558, 597 A. 2d, at 1362.

The defendant, Wiggins, was a painter working with a construction crew at the victim's apartment building on September 14 and September 15, 1988. *Wiggins* v. *State*, 352 Md. 580, 586, 724 A. 2d 1, 4 (1999) (*Wiggins II*). On September 15, Wiggins was seen having a brief conversation with the victim near the doorway of her apartment. That same night, Wiggins drove the victim's car to his girlfriend's house. *Ibid.* He was also in possession of the victim's credit cards and some of her jewelry. 324 Md., at 560-561, 597 A. 2d, at 1363. Wiggins and his girlfriend went on a shopping spree with the victim's credit cards and pawned a ring belonging to the victim. *Id.*, at 561, 597 A. 2d, at 1363.

On September 21, Wiggins was arrested while driving the victim's car. *Ibid.* After a bench trial, Wiggins was found guilty of first-degree murder, robbery, and theft. *Id.*, at 563, 597 A. 2d, at 1364. Wiggins then elected to have a jury determine his sentence on the murder conviction. *Id.*, at 563, 597 A. 2d, at 1365. The jury concluded beyond a reasonable doubt that he was a principal in the first-degree to the murder of the victim and that death was the appropriate sentence. *Id.*, at 565, 597 A. 2d, at 1365; *Wiggins* v. *Corcoran*, 288 F. 3d 629,

635 (CA4 2002). On direct appeal, the Maryland Court of Appeals affirmed the conviction and sentence in *Wiggins I.*

The state then provided extensive post-conviction review. Wiggins was represented by counsel and had a hearing on his claims, including his ineffective assistance of counsel claim. Wiggins claimed it was ineffective for trial counsel not to make out a case in mitigation based on his background at the penalty phase. *Wiggins*, 288 F. 3d, at 635. The trial court found that defense counsel had made a reasonable tactical decision. The trial court's decision was affirmed on review in *Wiggins II.*

Wiggins then filed for federal habeas relief. *Wiggins* v. *Corcoran*, 164 F. Supp. 2d. 538 (D. Md. 2001). The District Court found that defense counsel did not render effective assistance at sentencing. *Id.*, at 560. On appeal, the Fourth Circuit reversed, finding that defense counsel provided reasonably effective assistance, and the Maryland Court of Appeals' opinion was a reasonable application of *Strickland* v. *Washington*, 466 U. S. 668 (1984). *Wiggins* v. *Corcoran*, 288 F. 3d, at 643.

On November 11, 2002, this Court granted Wiggins' petition for certiorari.

SUMMARY OF ARGUMENT

The Sixth Amendment requires effective assistance of counsel. In the context of the penalty phase of a capital case, that includes a reasonable investigation of mitigating circumstances. This Court has consistently rejected rigid rules for determining effectiveness. In *Burger* v. *Kemp*, the Court expressly held that a decision to terminate further investigation into "background" mitigation evidence can be reasonable when counsel has made some investigation along that line and makes a strategic decision to focus the defense on a different line.

Amici supporting the defendant claim that the Court of Appeals' decision in this case eliminates the duty to investigate

and consider using background mitigation evidence. They misread the decision. The Court of Appeals' decision is a straightforward application of this Court's precedents in *Burger* and *Strickland* v. *Washington.*

The right to effective assistance is not a right to expend unlimited funds. Competent assistance includes making decisions on what to investigate within reasonable constraints on available resources.

The Eighth Amendment requires that the sentencer consider whatever mitigation the defendant proffers, but neither the Eighth Amendment alone nor the Eighth in conjunction with the Sixth requires that counsel proffer everything available.

While *Eddings* v. *Oklahoma* requires the jurors to consider the "background" type of mitigation evidence, it does not require them to accept it as mitigating or assign it any particular weight. In practice, this type of evidence is particularly weak. Large majorities of jurors assign it no weight at all. Residual doubt, on the other hand, is the most powerful of all mitigators.

Lawyers must have discretion on which arguments to make and which to leave out. Strategic omissions are not limited to those which directly conflict with the best argument. Weak arguments can hurt the defense case in the juror's minds merely by distracting from the strong ones or by diminishing the defense's credibility.

Lawyers may legitimately decide not to use background evidence if they believe they have a much stronger argument, such as residual doubt. They may competently decide not to conduct an exhaustive background investigation once they know enough about the background and the other mitigation argument to make a decision to go with the other one. That is what counsel did in this case, and their decision was well within the broad latitude allowed by *Strickland.*

The guidelines put out by the American Bar Association are entitled to no special weight in this Court's deliberations. Regrettably, that organization has forfeited its special place as

the voice of the entire profession. In matters of criminal law, the ABA now sides consistently with the defense against the prosecution, making it just one more interest group among many.

Acceptance of defendant's position would require overruling the clear holding of *Burger* v. *Kemp*. Both *Teague* v. *Lane* and AEDPA preclude doing so in this habeas case. The Maryland Court of Appeals' application of *Burger* to the facts of this case was eminently reasonable.

ARGUMENT

In *Burger* v. *Kemp*, 483 U. S. 776, 794 (1987), this Court rejected an ineffective assistance claim in a case where defense counsel "could have made a more thorough investigation [of background mitigation evidence] than he did." Under the circumstances of that case, "counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment." *Ibid.*

The question in the present case is whether the Court should establish a bright-line rule that a decision not to exhaustively investigate the defendant's background is *never* reasonable professional judgment. Quite simply, the question is whether *Burger* should be overruled. Because the case arises on habeas corpus, this question raises the threshold question of whether *Burger* can be overruled, given the limitations of *Teague* v. *Lane*, 489 U. S. 288 (1989) and 28 U. S. C. § 2254(d).

I. The Sixth Amendment does not require an exhaustive investigation of background in every capital case.

A. The Strickland Test.

The Sixth Amendment protects "the fundamental right to a fair trial." *Strickland* v. *Washington*, 466 U. S. 668, 684 (1984). Inherent in the right to a fair trial is the right to effective assistance of counsel. *Ibid.* "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*, at 686. That principle applies to both trial and capital sentencing proceedings. *Ibid.*

With those considerations in mind, this Court developed the clearly established two-part test for evaluating ineffective assistance of counsel claims. *Id.*, at 687. For a successful claim, a capital defendant has the burden of proving both prongs to the satisfaction of the reviewing court.

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid.*

Under the first part of the *Strickland* test, the defendant must rebut the presumption that counsel's performance was adequate by showing "that counsel's representation fell below an objective standard of reasonableness." *Id.*, at 688. The reasonableness of counsel's performance must be evaluated at the time of counsel's conduct under the totality of the circumstances. *Id.*, at 690.

> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then

determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Ibid.*

There is no merit to the argument that *Strickland* generally requires defense counsel to conduct an exhaustive background investigation in all capital cases. To the contrary, in *Strickland*, this Court stated, "counsel has a duty to make *reasonable* investigations or to make a *reasonable* decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*, at 691 (emphasis added). Thus, *Strickland* does not mandate an exhaustive investigation in every capital case, but rather an attorney has discretion to decide what and how much to investigate so long as that decision is reasonable under the circumstances of the case.

B. Reasonable Investigation v. "Scorched Earth."

There is a difference between strategic decisions to forgo further investigation of mitigating evidence, which take place prior to the penalty phase, see *Burger* v. *Kemp*, 483 U. S. 776 (1987), and decisions not to present mitigating evidence, which take place at the penalty phase. See *Darden* v. *Wainwright*, 477 U. S. 168 (1986). In *Burger*, *supra*, at 795, this Court held that defense counsel's decision not to pursue *further* investigation into the defendant's background after evaluating the mitigating evidence available to him was strategic and did not constitute ineffective assistance of counsel. In *Darden*, *supra*, at 186, this

Court held that defense counsel's performance is not ineffective if, after a complete investigation has been conducted, defense counsel decides not to present mitigating evidence of the defendant's background because it is more harmful than beneficial. In other words, sometimes evidence of the defendant's background can act as a "double-edged sword" and defense counsel's strategic decision not to present that evidence satisfies *Strickland*.

Contrary to the assertion of *amicus* ABA, see Brief for American Bar Association as *Amicus Curiae* 4 (ABA Brief), these two strategic decisions are not independent. They are closely connected. The decision to terminate further investigation of background evidence may be reasonable if counsel has enough information to form a judgment that another avenue is stronger. Given the general weakness of background-type mitigation, see *infra* at 24, it is not necessary to know every last detail before making this decision. In *Burger*, defense counsel "was aware of some, but not all," of the defendant's background information prior to trial. 483 U. S., at 790. The background evidence that might have been presented as mitigating concerned the defendant's "exceptionally unhappy and unstable childhood." *Id.*, at 789. Prior to trial, defense counsel spoke with the defendant's mother several times, an attorney who had befriended the defendant, and also men stationed with the defendant at Fort Stewart, Georgia. *Id.*, at 790-791. In addition, defense counsel reviewed psychologists' reports that were obtained with the help of the defendant's mother. *Id.*, at 791. Based on a review of that evidence, defense counsel chose not to investigate the defendant's background any further, believing "that his client's interest would not be served by presenting this type of evidence." *Ibid.*

The defendant argued that defense counsel's failure to conduct a thorough investigation into his background was ineffective because, if he had done so, he would have discovered much more information about defendant's troubled family background. *Id.*, at 793. This Court disagreed, stating that the

background information, which suggested that the defendant had violent tendencies, was "at odds with the defense's strategy of portraying [defendant's] actions on the night of the murder as the result of [another man's] strong influence upon his will." *Ibid.* Most importantly, however, this Court stated, "[t]he record at the habeas corpus hearing does suggest that [defense counsel] could well have made a more thorough investigation than he did. Nevertheless, in considering claims of ineffective assistance of counsel, '*[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.*' " *Id.*, at 794 (quoting *United States* v. *Cronic*, 466 U. S. 648, 665, n. 38 (1984)) (emphasis added).

Based on defense counsel's reasonable decision that conducting an exhaustive investigation into the defendant's background would not have reduced the possibility that the jury would impose the death penalty, this Court held that decision was "supported by reasonable professional judgment" and did not run afoul of *Strickland*. *Id.*, at 794-795. *Burger* focused on *Strickland*'s mandate that, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U. S., at 690-691. Because defense counsel in *Burger* decided that exhaustively investigating the defendant's background was not in his client's best interests, and doing so would reveal evidence that was inconsistent with the defense's strategy, under those circumstances it was reasonable to limit his investigation.

Amici in support of petitioner in this case urge this Court to adopt a rule that it is mandatory for defense counsel to conduct an exhaustive investigation into a capital defendant's background in all capital cases. In support of that argument, the ABA contends that their guidelines have "long stressed that investigation into mitigation evidence 'should comprise efforts to discover all reasonably available mitigating evidence and to rebut any aggravation evidence that may be introduced by the prosecutor.' " ABA Brief 13 (quoting ABA Death Penalty

Guidelines, Guideline 11.4.1(c)). The ABA guidelines are precisely that, guidelines, not constitutional mandate. See *Strickland*, 466 U. S., at 688.[2] When this Court considers ineffectiveness claims, it does not address what is "prudent or appropriate," but rather only " 'what is constitutionally compelled.' " *Burger*, 483 U. S., at 794 (quoting *Cronic*, 466 U. S., at 665, n. 38). Conducting an exhaustive investigation in all capital cases is not constitutionally compelled. As we will explain, the ABA's suggestion that this type of investigation is mandatory in all capital cases is contrary to the precedents of this Court eschewing bright-line rules in ineffectiveness cases and incompatible with the limited time, money, and resources defense counsel has in representing capital defendants.

In *Strickland*, this Court refused to establish any strict requirements that an attorney must always follow in order to succeed against an ineffectiveness claim. See 466 U. S., at 688-689. This Court believed that establishing such strict "rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.*, at 689. The key to the Sixth Amendment is ensuring that criminal defendants receive a fair trial, not improving the quality of legal representation generally. *Ibid.* This Court recently reaffirmed *Strickland*'s prohibition of hard and set rules for attorneys in *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000). In that case, the Ninth Circuit had established a bright-line rule that counsel must always file a notice of appeal, and that failing to do so was *per se* deficient unless the defendant specifically instructed counsel not to file. *Id.*, at 478. This Court reversed, holding that such a bright-line rule was inconsistent with *Strickland*, because counsel's performance must be evaluated for reasonableness under the totality of the circumstances. *Ibid.*; see also *Bell* v. *Cone*, 535

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2. For the reasons discussed in part III, *infra*, *amicus* CJLF submits that ABA guidelines are entitled to even less weight today than *Strickland* indicated in 1984.

U. S. 685, 152 L. Ed. 2d 914, 931, 122 S. Ct. 1843, 1853-1854 (2002) (rejecting rigid rule that counsel can never waive closing argument).

There have been other opportunities for this Court to adopt a bright-line rule that defense counsel must always conduct an exhaustive background investigation in all capital cases. Consistently declining these invitations, this Court has instead used *Strickland*'s reasonableness standard to conclude that a less than complete investigation into a capital defendant's background was sufficient under the circumstances. See *Burger*, *supra*; *Darden*, *supra*. In all of these cases, the test used was reasonableness, not a rigid rule.

If this Court were to adopt a *per se* rule that every defense attorney in every capital case must completely investigate every possible avenue of mitigation or their performance will be deemed ineffective, it would take away the wide latitude attorneys have in deciding how to best represent their clients. Law is an art, not a science, and a defense that may work well for one client or one case may not work well for another. Additionally, mandating defense counsel to conduct an exhaustive investigation in every capital case, when in some instances it may be unnecessary, would further elevate the expense associated with trying capital cases. This added expense may force some states and localities to forego justice and accept an unjustly lenient sentence because they could not afford the crushing financial burden. See Nappan, Now, Only Wealthy Counties Can Afford to Execute People, L. A. Daily J., Aug. 22, 1990, p. 6; see also part I-C, *infra*, at 15-18. Indeed, precisely this result may be behind the efforts of opponents of capital punishment to deliberately inflate the cost.

Amici defense lawyers contend that the Fourth Circuit's decision in this case "amounts to a per se rule that a lawyer is not required to investigate mitigating information in the defendant's background in a case in which the lawyer plans to contest aspects of the defendant's guilt in the sentencing phase." See Brief for National Association of Criminal Defense

Lawyers, *et al.*, as *Amici Curiae* 13. *Amici* misconstrue the Fourth Circuit's decision. The Fourth Circuit holds that if defense counsel is aware of mitigating evidence in the defendant's background, based on a reasonable review of that evidence, counsel may decide that mounting an exhaustive investigation would not be in the client's best interest. If counsel believed a different strategy is more beneficial to the client and decided to focus their resources there instead, that may be considered sound trial strategy, and the decision is subject to great deference under *Strickland*. *Wiggins* v. *Corcoran*, 288 F. 3d 629, 643 (CA4 2002). The opinion does not, as *amici* NACDL contend, hold that defense counsel is excused from investigating mitigating evidence altogether. That would run afoul of this Court's decision in *Williams* v. *Taylor*, 529 U. S. 362 (2000).

In *Williams*, this Court found that defense counsel's failure to conduct a background investigation and consequent failure to present any mitigating evidence of the defendant's background during sentencing was not sound trial strategy. See *id.*, at 395. The defendant's attorney did not seek out the defendant's juvenile and social service records because he was under the mistaken belief that state law prohibited him from doing so. *Ibid.* *Williams* is consistent with the precedents discussed above, however, because in *Williams* defense counsel did not and could not make *any* strategic decisions. This is because defense counsel had no evidence *at all* to consider and therefore could not make a reasoned decision about whether mitigation evidence of the defendant's background should be further investigated. *Kimmelman* v. *Morrison*, 477 U. S. 365 (1986) is similar. In that case, defense counsel's complete failure to conduct any pre-trial discovery was not a strategic decision because it was based on defense counsel's erroneous belief that the prosecution "was obliged to take the initiative and turn over all of its inculpatory evidence to the defense . . . ." *Id.*, at 385.

Another *amicus* brief in this case similarly employs the straw man fallacy, decrying "the Fourth Circuit's suggestion

that a duty to investigate does not exist, 288 F. 3d, at 640-41 . . . ." Brief of Janet F. Reno, *et al.*, as *Amici Curiae* 17. Such a suggestion would indeed be appalling, but the Fourth Circuit said nothing of the sort. Here is what the cited passage actually says:

> "*Williams* does not establish a *per se* rule that counsel must develop and present an exhaustive social history in order to effectively represent a client in a capital murder case. It merely reaffirms the long settled rule, in the context of a particularly glaring failure of counsel's duty to investigate, that defendants have a constitutional right to provide a factfinder with relevant mitigating evidence. [Citations.] *Williams* does require that counsel have some knowledge about potential avenues of mitigation on behalf of a client in order to make a decision that can be fairly characterized as a reasonable strategic choice. This, however, has always been the rule under *Strickland*, and the particular quantum of knowledge required depends on the facts and circumstances of each particular case. See *Strickland*, 466 U. S., at 691." *Wiggins* v. *Corcoran*, 288 F. 3d, at 640-641.

The Fourth Circuit simply recognized the distinction between a duty to make a reasonable investigation, which includes the discretion to cut off a particular avenue upon determining it is unlikely to be fruitful, and an iron rule of exhaustive investigations in every case, which this Court has repeatedly rejected.

This Court's precedents indicate that even though there is a strong presumption of attorney competence, and that most decisions made by attorneys are considered sound trial strategy, in situations where defense counsel *completely fails* to conduct *any* investigation into the defendant's background, whether due to a mistake of fact or law, or due to ignorance, then that decision cannot be considered sound trial strategy. The present case is readily distinguishable from *Williams* and much more akin to *Burger*. Defense counsel's *decision* to pursue the defense strategy of residual doubt and present that to the jury rather than continue an exhaustive search into the defendant's

background was objectively reasonable under the totality of the circumstances existing at the time defense counsel made their decision.

C. Effective Representation v. Unlimited Expenditure.

"Defense requests for investigative funds should be approved if it appears that the avenue of investigation is one that a reasonable attorney, with funds *but not unlimited funds*, would undertake." National Judicial College and National Conference of State Trial Judges, Capital Cases Benchbook 1-5 (1996) (emphasis added). Petitioner and supporting *amici* seek, in effect, to delete the condition in this statement and create a constitutional right to expend unlimited funds in the penalty phase of capital cases.

It is no secret that the cost of litigating capital cases from beginning to end is high. See Gold, Counties Struggle with High Cost of Prosecuting Death-Penalty Cases, Wall Street Journal, Jan. 9, 2002, p. B1; New York State Defenders Association, Capital Losses: The Price of the Death Penalty for New York State 26 (April 1, 1982). To mandate that defense counsel must always conduct an exhaustive search into a capital defendant's background in all capital cases, regardless of the circumstances, would not only cause the already high cost of litigating these cases to soar even higher, but it would lengthen the process as well.

To illustrate the effect such a rule would have on the already limited time and resources defense counsel has in litigating capital cases, it is necessary to describe what such an investigation process would entail. Exhaustive investigation into a capital defendant's background starts before the defendant's birth with obtaining information about the defendant's prenatal care and the birth process itself. Defense counsel must determine if there is any indication of head trauma, fetal alcohol syndrome, or drug addiction by the mother. The investigation would then move on to the defendant's family life, school records, work records, military records, criminal records of the

defendant and his family, mental health records of the defendant and his family, substance abuse issues of both defendant and his family, etc. Lyon, Defending the Death Penalty Case: What Makes Death Different? 42 Mercer L. Rev. 695, 703-708 (1991); see also ABA Brief 14-15 (quoting ABA Death Penalty Guideline 11.4.1(D)(2)(c)). During the search of all those records, defense counsel would also have to attempt to locate and interview people involved at each stage of the defendant's life, and determine whether it is advantageous to use them as character witnesses during the penalty phase. Costanzo & White, An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost, 50 J. of Soc. Issues 1, 10 (1994). This process may require defense counsel to explore the past "twenty, thirty, or forty years" of the defendant's life. Garey, Comment, The Cost of Taking a Life: Dollars and Sense of the Death Penalty, 18 U. C. D. L. Rev. 1221, 1251 (1985).

> "The investigation often includes extensive travel throughout the country and requires a skilled investigator who can locate persons from the defendant's past and persuade them to participate in a death penalty trial. An investigation for capital trials is generally three to five times longer than that for noncapital trials, and may take as long as two years." *Id.*, at 1252 (footnote omitted).

Although mitigation experts are available if defense counsel lacks the time to conduct such an exhaustive investigation on his or her own, the government is reluctant to pay for such experts. See Jones, Damned If You Do, Damned If You Don't, The Use of Mitigation Experts in Death Penalty Litigation, 24 Am. J. Crim. L. 359, 372 (1997). Generally, unless defense counsel can show the need for such an expert and the need for such evidence, courts will not authorize such funding. See *id.*, at 377. Nor should they.

Such an exhaustive investigation into every capital defendant's background, when doing so would be unnecessary under the circumstances, would be a great waste of judicial,

state, and human resources. This Court recognized that fact in *Burger* when it found reasonable defense counsel's strategic decision not to mount an exhaustive investigation after determining it was not in his client's best interest to pursue a mitigation theory.

Both the defendant and supporting *amici* contend that to ensure that the defendant receives a fair trial, the sentencing jury must be given the opportunity to consider relevant mitigating evidence of the defendant's background and character. See Brief for Petitioner 21-23; ABA Brief 7-10. Because of defense counsel's limited investigation in this case, the defendant and supporting *amici* contend that the defendant's rights were violated because the jury was not given the opportunity to consider this evidence. Although capital defendants have a right to present almost any mitigation evidence that they believe is necessary at sentencing, see *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), this right does not create a *per se* rule that every avenue of mitigation evidence of a capital defendant's background must always be exhaustively investigated in all capital cases. Rather, if counsel makes a strategic decision that it is in the best interests of the client to investigate and present the defendant's background, then the jury must be able to give effect to that evidence and use that evidence in imposing its sentence, and government action cannot interfere with the jury's ability to consider it. See *id.*, at 327-328; see also *Eddings* v. *Oklahoma*, 455 U. S. 104, 113-114 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality). However, although the jury must be able to consider and give effect to that mitigation evidence if it is presented to them, there is no requirement that the jury *accept* it. See *Eddings*, *supra*, at 115; see also Bilinois, Moral Appropriateness, Capital Punishment, and the *Lockett* Doctrine, 82 J. Crim. L. & Criminology 283, 311 (1991). Counsel's decision not to present evidence they believe to be weak does not violate the *Lockett*/*Eddings* rule.

Legal representation includes case management, as well as in-court advocacy. Lawyers who represent paying clients must

always keep an eye on expenditures and not run up unnecessary expenses or fees. To spend time and charge fees in excess of what is actually needed to do the job is unethical. See ABA Model Rules of Professional Conduct, Rule 1.5(a)(1) (2001 ed.). The Sixth Amendment does not exempt appointed counsel from the management constraints of limited resources that all other lawyers, including prosecutors, must deal with.

It would be exceedingly odd for the Constitution to create a right to unlimited funding for the *penalty* phase of a capital case, when no such right exists in the *guilt* phase of either capital or life-imprisonment cases. The determination of the proper punishment for a guilty murderer is important, to be sure, but nowhere near as important as the accurate determination of whether the defendant is really the person who committed the murder. The wrongful conviction of a person who is actually innocent is an injustice of vastly greater magnitude than *any* death sentence imposed on an actually guilty murderer, regardless of the mitigating circumstances. See *Schlup* v. *Delo*, 513 U. S. 298, 324-325 (1995). To give capital defendants the keys to the treasury to litigate issues having nothing to do with guilt, while those facing life imprisonment for a crime they may not have committed must make do with much less, would be a gross misplacement of priorities.

An indigent defendant is entitled to competent assistance operating within reasonable limits on resources. Operating within limits means terminating a line of investigation once it has been investigated far enough to determine that it will not be used. Under the clearly established law of *Strickland* and *Burger*, that is a strategic decision entitled to deference.

II. Defense counsel's tactical decision to forgo further investigation into the defendant's social history background was objectively reasonable under the circumstances of this case.

The Maryland Court of Appeals correctly concluded that the defendant's Sixth Amendment right to counsel was not violated in this case. Defense counsel's tactical decision to pursue one avenue of mitigation over another was objectively reasonable and did not prejudice the defendant. For the defendant to meet his burden of proving a claim of constitutionally ineffective assistance of counsel, he must establish that counsel's performance was deficient and that, because of the deficient performance, prejudice resulted. *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984).

As in *Burger* v. *Kemp*, 483 U. S. 776 (1987), defense counsel in this case did investigate and were aware of the defendant's difficult childhood. Specifically, they knew

> "[defendant] had been removed from his natural mother as a result of a finding of neglect and abuse; that there were reports of sexual abuse at one of his foster homes; that he had his hands burned as a child as a result of his mother's abuse; that there had been homosexual overtures made toward him by a job corps supervisor; and that he was borderline mentally retarded." *Wiggins* v. *Corcoran*, 288 F. 3d 629, 641 (CA4 2002).[3]

Defense counsel were made aware of this information through a presentence investigation report and the defendant's social service records. See *Wiggins* v. *State*, 352 Md. 580, 608-

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3. Actually, the last part of this statement is erroneous. There is no such category as "borderline mentally retarded." Defendant's IQ score of 79, see J. A. 349, precludes a diagnosis of retardation. He may qualify for a diagnosis of Borderline Intellectual Functioning, but not retardation. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 45 (4th ed. 1994) (ceiling is 70, but test score can be up to 75 due to measurement error).

609, 724 A. 2d 1, 15 (1999). Defense counsel also knew that the jury could consider this information as mitigating. *Id.*, at 609, 724 A. 2d, at 15. Armed with this information, defense counsel decided very early on to pursue a residual doubt theory at the penalty phase. The defendant takes issue with that decision arguing, "[d]eciding at the outset to retry guilt rather than develop a case in mitigation is not a 'reasonable decision' that makes investigation into mitigation unnecessary, for the obvious reason that counsel cannot know until after investigation whether the mitigation case would be a stronger basis for avoiding a death sentence." Brief for Petitioner 30. Common practice, however, is to "[d]evelop a theory of trial that compliments and does not fight with the theory of mitigation. It is not good to put on a 'he didn't do it' defense and 'he is sorry he did it' mitigation. This just does not work." Lyon, Defending the Death Penalty Case: What Makes Death Different? 42 Mercer L. Rev. 695, 708 (1991).

The theory presented at the guilt stage was that of innocence or at least reduced culpability. Defense counsel argued that the case against the defendant was entirely circumstantial, and he did not murder the victim. Based on their belief that the evidence against the defendant was weak, defense counsel made the strategic decision early on to carry that theory all the way through the penalty phase. Based on the evidence of the defendant's background that they had in front of them, they decided it was not in their client's best interests to pursue a "background" mitigation theory, since it was inconsistent with their theory at the guilt stage, and in their experience would work to the detriment of the defendant. They instead decided to focus their time and resources on developing and presenting a residual doubt theory. See *Wiggins*, 288 F. 3d, at 642-643.

Defense counsel were in an advantageous position in that the jury presiding at sentencing did not sit at the guilt phase of the trial. *Id.*, at 642. In essence, defense counsel would start with a clean slate. Because under Maryland's death penalty law the sentencing jury had to find beyond a reasonable doubt that

the defendant was the actual perpetrator of the murder, see *id.*, at 635, n. 2, defense counsel decided to take advantage of the "clean slate" by foregoing a case in mitigation based on the defendant's social history, and instead pursue a theory that the defendant was not the actual killer. Lingering doubt about a criminal defendant's guilt is one of the most effective strategies for avoiding the death penalty. See *Tarver* v. *Hopper*, 169 F. 3d 710, 715 (CA11 1999).

> " '*Residual doubt' over the defendant's guilt is the most powerful 'mitigating' fact.* — [A study of the opinions of jurors in capital cases] suggests that the best thing a capital defendant can do to improve his chances of receiving a life sentence has nothing to do with mitigating evidence strictly speaking. The best thing he can do, all else being equal, is to raise doubt about his guilt." Garvey, Aggravation and Mitigation in Capital Cases: What do Jurors Think?, 98 Colum. L. Rev. 1538, 1563 (1998) (emphasis in original; footnote omitted).

Although defense counsel could have investigated and presented alternate theories to the sentencing jury, *i.e.*, residual doubt and a case in mitigation based on defendant's social history, nothing in this Court's precedents requires defense counsel to choose that route. In fact, doing just that could have been counterproductive and done more harm to the defendant's case than good. Defense counsel presented to the sentencing jury a case of residual doubt about the defendant's participation in the murder. Counsel was trying to create reasonable doubt in the minds of the jury, because, if this effort succeeded, the death penalty would be taken completely off the table as an option. See *Wiggins*, 288 F. 3d, at 635. After presenting the "residual doubt" evidence, should counsel then turn the tables and state, "on the other hand, if you do not believe any of the evidence I just presented to you, and you believe that the defendant is in fact the actual killer, then you should not impose the death penalty because of the defendant's horrific childhood and borderline intellectual functioning"? The two theories

clash and defense counsel must have great leeway to "winnow out" weaker arguments and focus instead on those that are the strongest and in the best interests of their client. See, *e.g.*, *Jones* v. *Barnes*, 463 U. S. 745, 751-752 (1983); see also *Darden* v. *Wainwright*, 477 U. S. 168, 186 (1986) (sometimes presenting evidence of defendant's background in mitigation can do more harm than good); *Burger* v. *Kemp*, 483 U. S. 776, 791-792 (1987) (same). Defense counsel was cognizant of the conflict in the theories from the beginning and made a conscious decision to focus their resources on, and to pursue only, the residual doubt theory. *Wiggins*, 288 F. 3d, at 642. In fact, lead defense counsel "stated that he chose to focus on one theory of Wiggins' case at sentencing because the 'shotgun approach' often confuses the issues and works to the detriment of the defendant." *Id.*, at 643.

Even in situations where there is not a conflict in defense theories, defense counsel may decide not to present background evidence in mitigation because it could still be harmful to the presentation of the defense's case. This Court has noted that counsel's decision not to present a conflicting theory to the jury or to withhold evidence that may act as a double-edged sword, and thus to the detriment of the defendant, does not run afoul of the Sixth Amendment. See *Burger*, 483 U. S., at 793, 795-796; *Darden*, 477 U. S., at 186-187. Those holdings, however, do not imply that defense counsel must always present to the jury every possible nonconflicting theory to "see what sticks." Rather, doing just that would unduly clutter the jury's thought process and distract from the strongest theory of the case. To win over a jury, defense counsel must have the discretion to rely upon their expertise to focus upon the most persuasive theory of the case and leave less persuasive theories on the cutting room floor.

The trial lawyer's job is to convince a jury of twelve ordinary folks, not a panel of appellate judges. This is an important difference.

> "Do not argue in the alternative. In law school and in practice before judges, we all become comfortable arguing in the alternative. Real people (as opposed to attorneys!) do not understand the theory of arguing in the alternative. When they hear an attorney say, 'Even if I am wrong, about point one, I am right about point two,' real people interpret this as an admission that the attorney is indeed wrong about point one. Even worse, the attorney's lengthy, but now conceded, argument about point one *diminishes his credibility on point two*!" S. Easton, How to Win Jury Trials: Building Credibility with Judges and Jurors 18-19 (1998) (emphasis added).

Based on his or her experience, defense counsel is in the better position to determine how the jury will perceive evidence of the defendant's social history background. Under *Strickland*, defense counsel merely need to show that his or her decision not to present background evidence to a particular jury was reasonable under the circumstances.

The proposition that the "abuse excuse" type of evidence must always be exhaustively investigated before deciding whether to use it seems to rest ultimately on a belief that this type of evidence is exceptionally persuasive. This premise is flawed.

In *California* v. *Brown*, 479 U. S. 538 (1987), Justice O'Connor referred to a "belief, long held by this society, that defendants who commit criminal acts that are *attributable* to a disadvantaged background . . . *may* be less culpable than defendants who have no such excuse." *Id.*, at 545 (concurring opinion) (emphasis added). This belief is widely held, but it is not universally held. In particular, the premise that the crime is *attributable* to the background is rejected by a great many people. Most people who grow up poor or who suffer abuse at the hands of an alcoholic stepparent do not become murderers. Some of them grow up to be President. Some may be sitting on the jury.

A survey of jurors indicates that childhood poverty is an exceedingly weak mitigating circumstance, with 83.6% giving it no weight at all. Garvey, 98 Colum. L. Rev., at 1559. Childhood abuse is rejected as mitigating by nearly two-thirds. *Id.*, at 1559, 1565. *Eddings* v. *Oklahoma*, 455 U. S. 104, 115 (1982) noted that "such evidence properly may be given little weight," and it appears that jurors often do exactly that. In contrast, residual doubt of guilt is far and away the most powerful mitigating factor. *Garvey*, *supra*, at 1563[4]; *supra*, at 21.

Eddings, 455 U. S., at 117, requires that evidence of this type be considered if proffered, but neither *Eddings* alone nor *Eddings* in conjunction with *Strickland* requires that it be proffered in every case where it is available. In a case where other mitigating factors are available, especially the exceptionally powerful residual doubt, counsel may reasonably conclude the "background" evidence will detract from rather than enhance the defense.

In this case, defense counsel considered the facts and decided that pursuing a residual doubt defense to the sentencing jury would be the best way to defend their client. See *Wiggins*, 288 F. 3d, at 641-642. The fact that it was not successful is irrelevant to whether counsel's choice was objectively reasonable at the time it was made. See *Strickland*, 466 U. S., at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.")

Under the facts of this case, defense counsel knew of and were aware of the defendant's background. Based on the information they had, they decided that mounting an exhaustive

4. Status of accomplice versus actual killer was not among the factors surveyed. See *id.*, at 1555, 1559.

search into the defendant's background would be a waste of their time and resources, because pursuing a residual doubt defense was better for their client. That was sound trial strategy. Because this case falls within the "wide latitude counsel must have in making tactical decisions[,]" *Strickland*, 466 U. S., at 689, defense counsel provided objectively reasonable effective assistance and satisfied the first *Strickland* prong.

III. The ABA's position, as such, is entitled to no special weight.

The American Bar Association has filed a brief in the present case as *amicus curiae* in support of the defendant. The ABA asks this Court to accept its guidelines as the consensus of the American legal profession. See Brief for American Bar Association as *Amicus Curiae* 4. This claim requires the closest scrutiny.

The ABA brief in the present case appears to be at least the fourteenth consecutive brief filed in this Court by the ABA on the defense side in criminal cases in the last ten years, with zero briefs in support of the prosecution during that period.[5] See Federalist Society Criminal Law and Procedure Practice Group, The ABA and Criminal Justice Issues 5-6 (1997) (5 cases); American Bar Association, ABA Amicus Briefs, http://www.abanet.org/litigation/committee/amicus/abapolicy.doc (viewed Feb. 11, 2003) (6 criminal cases); Brief for American Bar Association as *Amicus Curiae* in *McCarver* v. *North Carolina*, No. 00-8727; *Atkins* v. *Virginia*, 534 U. S. 1053 (2001) (granting motion of ABA, *et al.*, to consider their *McCarver* briefs in *Atkins*). There is certainly no shortage of

5. The last ABA brief in support of a prosecutor that *amicus* CJLF has been able to find was 15 years ago in *Morrison* v. *Olson*, 487 U. S. 654 (1988), and even that one was in an unusual case with heavy political overtones.

worthy cases in which an unbiased bar association might support prosecutors. See, *e.g.*, *Calderon* v. *Ashmus*, 523 U. S. 740, 743 (1998) (attorneys enjoined by a judge from even arguing an entirely plausible legal position in the interest of their client, the state, in other cases pending before other judges); Scheidegger, ABA Briefs in the 1997-98 Supreme Court Term, 2 Criminal Law News, No. 3, p. 12 (Federalist Society, Winter 1998).

The ABA's uniform tilt to one side is not limited to its activities in the judicial branch. An analysis of the ABA's legislative priorities over a three-year period, as listed in the ABA Washington Letter, revealed eleven issues with clear prosecution and defense sides. The ABA position was the defense position in eleven out of eleven. See ABA and Criminal Justice Issues, *supra*, at 8-9.

If numbers alone can ever raise an inference of bias, this lengthy and extensive record of uniformly coming down on one side makes a nearly conclusive case that the ABA represents the defense view in criminal matters and not the whole profession. It is simply not credible that any kind of evenhanded decision-making process could result in such uniformity. See *Teamsters* v. *United States*, 431 U. S. 324, 342, n. 23 (1977) (" 'the inexorable zero' "). Even organizations which are frankly advocates for one side of the debate cross over on occasion. See, *e.g.*, Brief for American Civil Liberties Union as *Amicus Curiae* in *Wisconsin* v. *Mitchell*, No. 92-515 (supporting prosecution); Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Powers* v. *Ohio*, No. 89-5011 (supporting defense).

Prosecutors are members of the profession. So, too, are those attorneys who are nongovernment advocates for victims' rights. A genuine consensus of the profession on the minimum standards to constitute effective assistance of counsel would be a set of standards that major, reputable organizations on both sides of the divide had come together and agreed upon. If the ABA's guidelines represent a consensus, where is the endorse-

ment by the National District Attorneys' Association, the National Association of Attorneys General, or any other substantial, reputable organizations on law enforcement or victims' side of the aisle? No such concurrence is cited in the ABA's brief.

Adoption of a policy by the ABA itself certainly does not prove a consensus of the profession, or even provide significant evidence of it. As long ago as 1992, the ABA's own committee noted the decline in ABA participation by prosecutors, due in large part to the ABA being "captive to the narrow adversarial interests of the defense bar." American Bar Association Advisory Committee on the Prosecution Function, Prosecutors and the ABA 1, 31-32 (1992) (ABA Advisory Committee). As the briefs and legislative positions described above demonstrate, the few prosecutors who have not yet voted with their feet are routinely steamrollered in the process of determining ABA positions. See also ABA Prosecutor Dissent to ABA House Report No. 107 (Feb. 1997) (on moratorium resolution), http://www.abanet.org/crimjust/prosec.html#dissent.

The ABA once had a special place as the voice of the profession. Ten years ago, its own committee warned that status was "in grave danger." ABA Advisory Committee, at 1. The ABA did nothing to correct the situation, and it has only gotten worse. The executive branch has already recognized the reality that the ABA is now just another interest group among many. See Alberto Gonzales, Letter to ABA President Martha Barnett (Mar. 22, 2001), http://www.whitehouse.gov/news/releases/2001/03/20010322-5.html. The judicial branch should face the same reality.

The ABA Death Penalty Guidelines are the position of one interest group on one side of the criminal law debate. They warrant no special weight in this Court's consideration of this case.

IV. *Teague* and AEDPA preclude overruling *Burger* in this habeas case.

The present case arises on federal habeas corpus. Consequently, two additional limitations on a federal court's ability to grant relief apply. First, the rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), precludes the creation or application of new rules, with exceptions not applicable here. Second, 28 U. S. C. § 2254(d), adopted in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), limits the scope of the federal court's review.

Strickland v. *Washington*, 466 U. S. 668 (1984) is both an "old rule" for *Teague* and "clearly established Federal law" for AEDPA. See *Williams* v. *Taylor*, 529 U. S. 362, 390-391 (2000). *Burger* v. *Kemp*, 483 U. S. 776 (1987) is also established law. As discussed earlier, the proposition that a lawyer may, consistently with the requirement of effective assistance, terminate further inquiry into "background" mitigation evidence, once he or she knows the general nature of what is available and decides to pursue a different strategy, is consistent with *Strickland*, see *supra*, at 8, and is the holding of *Burger*. See *supra*, at 10. Adoption of a *per se* rule to the contrary would be an overruling of precedent and the imposition of a new burden, the quintessential "new rule." See *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990).[6]

Nor is the Maryland Court of Appeals' application of the rules to the facts of this case anything approaching "unreasonable." As discussed *supra*, comparing the facts of the present case with this Court's precedents in cases of less than exhaustive investigation, we see that *Burger* is the closest precedent.

The present case is a perfect example of the kind of case in which Congress intended to preclude federal court interference

6. The *Teague* exceptions are obviously inapplicable, as such a rule would neither legalize murder nor have "the primacy and centrality of the rule adopted in *Gideon* . . . ." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

with the state court decision. The state court recognized the correct precedents and applied them reasonably to the facts of the case. Not everyone will agree with the outcome, but that is the nature of legal decision. To say that the state court decision is unreasonable would itself be unreasonable. Congress has forbidden the federal courts to overturn such a judgment on habeas corpus. See *Woodford* v. *Visciotti*, 537 U. S. __, 154 L. Ed. 2d 279, 288, 123 S. Ct. 357, 361 (2002) (*per curiam*).

CONCLUSION

The decision of the United States Court of Appeals for the Fourth Circuit should be affirmed.

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Respectfully submitted,

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